Signed Copy

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
SEP 2 0 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM, 1975

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri,
and
R. DEAN WOCHNER, M.D., Director of Health and Hospitals, and Acting Commissioner of Hospitals of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, and a Class,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

JACK L. KOEHR
City Counselor of the City of St. Louis, State of Missouri
EUGENE P. FREEMAN
Deputy City Counselor of the City of St. Louis, State of Missouri
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103
314-453-3366
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

40

INDEX

	Page
Opinions Below	2
Statement of Jurisdiction	3
Questions Presented for Review	3
Positive Law Provisions Involved	4
Statement of the Case	10
Jurisdiction Below	10
Facts Material to Questions Presented	10
Reasons for Granting a Writ of Certiorari	23
I. Abortion on Demand	23
II. Appellate Abuse of Discretion	27
1. Overturning District Court's Findings	27
2. Court of Appeals Initiation of Petitioner Mayor's Convictions of "Bad Faith" and Imposition of Punishment by Levying "Attorney Fees"	33
III. Justiciability, Standing and Mootness	39
Conclusion	53

Appendices

District Court Memorandum and Order, filed March 22, 1974, with "Exhibit 1"	A-1
Court of Appeals Opinion, filed June 4, 1974	A-11
Court of Appeals Order, denying petition for rehearing and rehearing en banc, entered June 27, 1974	A-18

District Court Memorandum and Order, filed January 13, 1975 ..... A-19

Court of Appeals Opinion, filed April 14, 1975 ..... A-27

Court of Appeals Order, denying petition for rehearing and for rehearing en banc, and in response to motion for rehearing en banc, modifying opinion filed April 14, 1975, entered May 7, 1975 ..... A-40

Court of Appeals Order, in response to motion of appellees, amending opinion filed April 14, 1975, as revised by order of May 7, 1975, and granting appellees right to file a second petition for rehearing and rehearing en banc entered June 2, 1975, with opinion by Van Oosterhout, senior Circuit Judge, concurring in part and dissenting in part A-44

Court of Appeals Order, denying second petition for rehearing and rehearing en banc, entered June 24, 1975 A-54

District Court Order, entering judgment on mandate of Court of Appeals issued July 8, 1975, pursuant to opinion filed April 14, 1975, as modified on May 7, 1975, and June 2, 1975, entered August 8, 1975 ..... A-55

District Court Memorandum and Order, filed August 8, 1975 ..... A-56

Notice of Appeal of Jane Doe, et al., plaintiffs, filed August 14, 1975 ..... A-60

Court of Appeals Clerk's acknowledgement of filing of Appeal, dated August 22, 1975, and notice of probable hearing October 13, 1975, in St. Paul, Minnesota A-62

Charter of the City of Saint Louis, Missouri, Table of Contents A-65

Article XVIII, Civil Service, of the Charter of the City of St. Louis A-67

TABLE OF AUTHORITIES CITED

Cases

Abele v. Markle, 452 F2d 1121 (C.A. 2nd 1971) 49

Alyeska Pipeline Service Co. v. Wilderness Society, — U.S. —, 95 S.Ct. 1612, 44 L.Ed.2d 141 (S.Ct. 1975) 34, 38

Bailey v. Patterson, 369 US 31 (S.Ct. 1962) 46

Baker v. Carr, 369 US 186 (S.Ct. 1962) 45

Barlow v. Collins, 397 US 159 (S.Ct. 1970) 50

Birdwell v. Hazelwood School District, 491 F2d 490 (C.A. 8th, 1974) 33

Commissioner of Internal Revenue v. Duberstein, 363 US 278 (S.Ct. 1960) 32

Crossen v. Breckenridge, 446 F2d 833 (C.A. 6th, 1971) .. 50

Doe v. Bolton, 410 US 179 (S.Ct. 1973) 24, 25, 27, 35, 37

Doe v. Poelker, 497 F2d 1063 (C.A. 8th, 1974) 31

Doe v. Poelker, 515 F2d 541 (C.A. 8th, 1975) 26, 27

Flast v. Cohen, 392 US 83 (S.Ct. 1968) 41

Golden v. Zwickler, 394 US 103 (S.Ct. 1969) 42, 44, 45

Indiana Employment Division v. Burney, 409 US 540 (S. Ct. 1973) 46

Linda R.S. v. Richard D., 410 US 614 (S.Ct. 1973) 46

North Carolina v. Rice, 404 US 244 (S.Ct. 1971) 45

Parke-Davis and Co. v. Stromsodt, 411 F2d 1390 (C.A. 8th, 1969) 33

Pendergrass v. New York Life Insurance Co., 181 F2d 136 (C.A. 8th, 1950) 32

Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972) 51

Roe v. Ferguson, — F2d —, April 28, 1975, No. 74-2195 (C.A. 6th, 1975) 36

Roe v. Norton, — F2d —, July 31, 1975, No. 74-1874 (C.A. 2nd, 1975) 37

Roe v. Wade, 410 U.S. 113 (S.Ct. 1973) 24, 25, 27, 35, 37, 45, 46, 47, 48, 49, 50, 51, 52

Toledo Scale Co. v. Computing Scale Company, 261 US 399 (S.Ct. 1923) 39

Traux v. Raich, 239 US 33 (S.Ct. 1915) 51

United Public Workers v. Mitchell, 330 US 75 (S.Ct. 1947) 40

United States v. Raines, 362 US 17 (S.Ct. 1960) 41

United States v. 12 200-Ft. Reels, 413 U.S. 123 (S.Ct. 1972) 38

United States v. United States Gypsum Co., 333 US 364 (S.Ct. 1948) 32

United States v. Vuitch, 402 US 62 25

Universal Oil Products Co. v. Root Refining Co., 328 US 575 (S.Ct. 1964) 38, 39

Vaughan v. Atkinson, 369 US 527 (S.Ct. 1962) 39

Word v. Poelker, 495 F2d 1349 (C.A. 8th, 1974) 35, 37

Wulff v. Singleton, 508 F2d 1211 (C.A. 8th, 1974), cert. gr. 43 LW 3674, June 24, 1975 .....35, 36, 37

Statutes and Court Rules

Charter of the City of St. Louis, Article XVIII 24

Federal Rules of Civil Procedure, Rule 52(a) ...28, 29, 32, 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri,

and

R. DEAN WOCHNER, M.D., Director of Health and Hospitals, and Acting Commissioner of Hospitals of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, and a Class,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The petitioners John H. Poelker and R. Dean Wochner, respectfully pray that a writ of *certiorari* issue to review the judgments and opinions of the United States Court of Appeals for the Eighth Circuit entered in the proceedings between these petitioners and respondent in such court.[1]

[1] For simplicity, the parties are throughout identified by their present status of petitioners and respondent.

OPINIONS BELOW

A. There are three Memoranda and Orders of the United States District Court, Eastern District, Eastern Division, which at this date, through publisher's oversight and recency are not yet reported. However, each is herewith presented in the separate Appendix; these are:

1. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73C-565(A), entered on March 22, 1974;

2. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73C-565(A), entered on January 13, 1975; and

3. *Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.*, Case No. 73C-565(A), entered on August 8, 1975.

B. There is an opinion of the Court of Appeals for the Eighth Circuit entered on June 4, 1974, reversing the District Court in A-1 above, reported officially as *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 497 F.2d 1063. This opinion is included in the Appendix.

C. There is an opinion of the Court of Appeals for the Eighth Circuit filed April 14, 1975, reversing the District Court in A-2 above: there are also two substantial modifications of this opinion by subsequent orders entered: May 7, 1975, and June 2, 1975. The case is reported as *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 515 F.2d 541, as the opinion finally evolved after the modifications. The opinion and each successive opinion modifying order are included in the Appendix.

JURISDICTION

A final judgment dated and entered by the Court of Appeals on April 14, 1975, is sought to be reveiwed.

The Court of Appeals entered an interlocutory judgment reversing a judgment of the District Court and remanding the case for trial on June 4, 1974. Timely petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals' order made on June 27, 1974.

A final judgment of the Court of Appeals, reversing the District Court and remanding for limited purposes was dated and filed on April 14, 1975. Timely petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals' order of May 7, 1975; and such order, in response to said petitions, substantially modified the opinion and judgment of April 14, 1975. Upon petitioners' timely motion for further amendment of the opinion and judgment as modified, the Court of Appeals again substantially modified its opinion and judgment on June 2, 1975, and granted petitioners the right to file second petitions for rehearing and rehearing *en banc*. Timely second petitions for rehearing and rehearing *en banc* were filed and denied by the Court of Appeals' order entered on June 24, 1975.

The Supreme Court's sound judicial discretion for issuance of a writ of *certiorari* is invoked under its jurisdiction conferred by 28 U.S.C. Section 1254(1). This petition for certiorari was filed within 90 days of the effective date of the judgment, June 24, 1975.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a woman's Federal constitutional privacy rights regarding abortion requires a municipally staffed and operated hospital to furnish medical personnel and facilities to comply

with her request for an abortion based on her financial distress within her first trimester of pregnancy where no medical indications exist.

2. Whether the Fifth Amendment Due Process Clause of the United States Constitution and Rule 52(a) of the Federal Rules of Civil Procedure prohibit a Court of Appeals from finally reversing a District Court's well-found findings and substituting its own contrary Complaint constructions and factual conclusions, and then, for the first time, on such appeal relying thereon, levying punitive substantial "attorney fees" for "bad faith," without there having occurred any trial of any of such issues or conclusions in the District Court.

3. Whether Article III of the Federal Constitution requiring a case or controversy bars a Court of Appeals' judgment in favor of a woman pregnant at the time of filing suit for personal relief, and as sole representative of a class, claiming a constitutional right to an hysterectomy and an abortion by a municipality, where she secretly procures an abortion within five (5) days of filing and prior to summons of one defendant and before the case is heard by the District Court.

POSITIVE LAW PROVISIONS INVOLVED

The Constitution of the United States

Article III:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation,

which shall not be diminished during their Continuance in Office.

Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Amendments to the United States Constitution:

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, providing in applicable part:

* * * nor be deprived of life, liberty, or property, without due process of law;

Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Ninth Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Constitution of the State of Missouri, 1945

Article I, Bill of Rights

In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare:

* * * * * * * *

Section 2. Promotion of general welfare—natural rights of persons—equality under the law—purpose of government. That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

* * * * * * * *

Section 5. Religious freedom—liberty of conscience and belief—limitations. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority

can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office of trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.

Missouri Statutory Provisions

Section 197.032, Revised Statutes of Missouri, Laws 1973.

197.032. Hospitals and medical personnel may refuse abortions—no denial of public benefits for such refusal—civil action, when

1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of any such refusal to treat or admit for treatment any woman for abortion purposes.

2. No person or institution shall be denied or discriminated against in the reception of any public benefit, assistance or privilege whatsoever or in any employment, public or private, on the grounds that they refuse to undergo an abortion, to advise, consent to, assist in or perform an abortion.

3. Any person who shall deny or discriminate against another for refusal to perform or participate in an abortion shall be liable to the party injured in an action at law, suit in equity or other redress.

Charter of the City of St. Louis[2]

Article XVIII, Civil Service:

Sec. 3, (n) *Removals and demotions.*—For removals, demotions and decreases in pay in the cases of employes whose service rendered is below satisfactory standards, designed to promote the efficiency of the service. Such action shall be effective only after written notice to, with right of appeal in, the employes affected, and after such investigation as is appropriate to insure that the action taken is on the sole ground of merit and fitness.

Sec. 16. Racial, political and religious discrimination. —No recommendation or question under the authority of this article shall relate to the race, political or religious opinions, affiliations or service of any person. No person shall be appointed to a position in the classified service hereunder, nor be demoted, re-employed, promoted, removed, increased or reduced in compensation, nor in any other way be favored or discriminated against in any matter within the purview of this article, because of his race, political or religious opinions, affiliations or service.

Sec. 22. Violations of civil service provisions.—Any person who shall willfully or through culpable negligence violate or conspire to violate any provision of this article or of any ordinance made pursuant theretofore which no other punishment is provided herein, shall be guilty of a misdemeanor, and, upon conviction thereof in any court

[2] Article XVIII, is reproduced in full in the Appendix.

of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars or by imprisonment for not to exceed six months, or both, in the discretion of the court. The conviction of any employe of any such offense shall operate automatically to terminate his service and to vacate his position. Any employe so removed from the service shall not be reinstated, reemployed or reappointed, or in any other manner re-enter the service of the City of St. Louis for a period of five years from the date of such conviction, and the comptroller and any other fiscal officers responsible for payment of any compensation to such person are hereby charged with notice thereof. Nothing in this section shall be construed to supplant or in any way affect any prosecution that may be elected to be initiated under any other provision of law relating to the nonfeasance, malfeasance or misfeasance of public officers.

Federal Rules of Civil Procedure

Rule 52, findings by the court:

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing the interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the find-

ings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Jurisdiction Below

The United States District Court's jurisdiction was predicated upon claims based upon the First. Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution asserted under United States Code, Title 28, Chapter 85, Section 1343, Title 28, Chapter 151, Sections 2201 and 2202, and Title 42, Chapter 21, Section 1983.

The United States Court of Appeals' jurisdiction was grounded upon its statutory powers according to United States Code, Title 28, Chapter 81, Section 1291, and Federal Rules of Appellate Procedure, Rule 4(a).

Facts Material to Questions Presented

This case was filed on August 17, 1973, in the District Court (E.D., E.D., Mo.) by the respondent as a sole plaintiff claiming to represent a too numerous class to join of pregnant women residents of St. Louis. The only named defendants were the Mayor of St. Louis and the City's Director of Health and Hospitals.

At the time of the filing, and for a period of a year thereafter, the respondent intentionally withheld from the petitioners her identity and all factual matters from which the truth or falsity

of the Complaint's averments could be determined. Because of the respondent's principal attorney's express refusal to permit civil rule discovery without protective orders, petitioners, on September 21, 1973, moved for an order, with reasonable limitations which might appear proper, requiring submission to discovery according to the Federal Rules of Civil Procedure.

The Complaint upon filing, after recitation of the jurisdictional grounds for the suit (see above), and an explanation of the failure to identify the respondent so as to avoid "embarrassment and harassment," claimed respondent was a married woman with a family, in her first trimester of pregnancy, who could not afford the expense of another child and consequent loss of employment because of the family's "severe financial straits." That she suffered certain reproductive organ difficulties which necessitated an hysterectomy which properly should be simultaneously done with the abortion she desired. She further claimed that she had gone twice in August of 1973 to one of the two hospitals of the City of St. Louis and was there advised by the hospital staff physicians to get an abortion elsewhere and then return for the hysterectomy which they recommended be done. She claimed such physicians expressed to her their refusal to abort her because of a stated hospital policy of a blanket prohibition of abortions. The claim was made that the petitioner Mayor, being the chief executive officer exercising control over the petitioner Director of Health and Hospitals and the City hospitals, on many occasions stated that abortion would not be allowed, and because of his high position, his statements were largely responsible for the existing situation of prohibiting abortions.

The stated claim for bringing the action was her (and the class she claimed to represent) desire to utilize the personnel, facilities and hospital "for the termination of said pregnancy," and that such policies, rules, regulations, procedures, and practices interfere with and deprive her and "her respective physician

of the right of privacy within the patient-physician relationship," and also deprive her of right as a woman "to determine for herself whether to bear children and maintain her marital privacy" as guaranteed by the Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

The relief prayed for in the Complaint was a declaratory judgment that any City policies, etc. barring, thwarting, limiting, and infringing upon the utilization of the personnel, facilities, and services of the City's hospitals for abortions, are violative of her and the class's constitutional rights; and for a "permanent injunction" to restrain petitioners and their agents from enforcing such policy, etc., against respondent or the class, so as to avoid "irreparable harm and injury to plaintiff and said class." (This latter prayer for injunctive relief was stricken by respondent on October 11, 1974.)

By a pre-filing agreement between the respondent and the American Civil Liberties Union, the corporation procured at its expense an abortion of respondent five days after the suit was filed (e.g., Aug. 22, 1973), furnished four attorneys of record to file and prosecute suit, and agreed to assume all costs, attorneys fees and other expenses of the litigation. Such abortion was done in secret (all other matters of adversary interest occurring after suit were currently broadcast to the news media by the A.C.L.U. attorneys of record or occasionally by others of such organization). The District Court and the petitioners first learned of the abortion six (6) months later on February 25, 1974; again by remarks to the media by respondent's attorney. At the time of the respondent's abortion, one of the petitioners, the Director of Health and Hospitals, had not been summoned.

Petitioners made answer on September 21, 1973, without benefit of discovery, and besides denials of the Complaint's crucial allegations, set up such general matters of defense thought

appropriate in their condition of factual uncertainty existent at the time.

On October 5, 1973, at a time petitioners were awaiting judicial relief to accomplish discovery on the allegations of the Complaint, the respondent moved for summary judgment upon a claim that the pleadings then filed (petitioner Mayor had answered interrogatories Oct. 4, 1973) and an annexed affidavit of respondent, demonstrated that no material issues existed.

This affidavit was made the day before it was filed on October 4, 1973, and the jurat was supplied by one of the respondent's attorneys of record. The affidavit tracted the Complaint's conclusionary allegations of fact, but added (par. 8) that she had been advised by a private physician "that the ordinary and routine medical procedure *in her situation* is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, * * *" (emphasis added). Finally, the affidavit ended (par. 9) with the statement:

> 9. The present and real threat by defendants to implement and enforce the policy herein challenged deters said plaintiff from receiving medical care in a manner beneficial for her health and safety and in a manner consistent with the highest standards of medical practice.

The affidavit, so far as it positively states that petitioner was then in need of an hysterectomy and simultaneous abortion was materially false, and deceptive to both the District Court and petitioners, and could hardly not be known as false by the attorneys for respondent who were also agents of the A.C.L.U. which had accomplished the abortion of petitioner over two months prior pursuant to the aforesaid agreement.

In response, petitioners, in their situation of respondent's devised ignorance, in order to protect against the threat of summary judgment, reminded the Court by motion of their existing

discovery disability and consequent incapacity to oppose the respondent's motion with any contrary factual matters, and again asked for discovery on respondent and denial of her motion for summary judgment. The Court did not, at the time, rule on the matters.

As a result of the knowledge learned as beforesaid on or about February 22, 1974, petitioners on February 25, 1974, moved the District Court for an order requiring petitioner to disclose whether her claimed pregnancy had been aborted and her reproductive organs had been removed, permanently barring further pregnancy. On the same day (Feb. 25, 1974) respondent's attorney in response to an oral instruction from the Court, filed a letter admitting the abortion of respondent on August 22, 1973, but making no mention of the hysterectomy claimed to have been required. Concomitantly the petitioners moved the Court to dismiss this action. By memorandum order filed March 22, 1974, the District Court granted petitioners' motion on the grounds of the respondent's lack of personal and representative standing and the mootness resulting from the abortion before the case could be heard.

Respondent appealed the District Court's judgment to the Court of Appeals for the Eighth Circuit on March 26, 1974.

On appeal respondent did not formally present any questions to the Court of Appeals but argued "The Inappropriateness of Dismissal for Lack of Standing" and importuned the Court to decide the case in her favor on the basis that the policy (then of undefined import and unknown application to respondent) "* * * intruded into the decision-making privacy of the woman and the medical personnel of these [City's] institutions. * * *" The Court reversed and remanded on the basis that pregnancy at time of filing but not at time of hearing was sufficient for both personal and representative standing, and non-pregnancy before hearing at the trial level did not render the claims of respondent

moot. Petitioners' timely rehearing and rehearing *en banc* petitions were denied.

After the Court of Appeals' reversal and remand, the District Court held a pre-trial conference to consider and dispose of matters delaying trial. At this time, upon the Court's expression of intent to order discovery on the respondent, her attorneys agreed to an oral deposition setting. Also at this time in response to respondent's attorneys' inquiry, the Court informed both parties' attorneys that the Complaint would be construed as not raising any issue concerning the staffing practices or procedures at the City's hospitals; but that the Complaint could be amended or a new suit filed so as to put such matters in issue. In the history of the case the Complaint was never so amended and the trial court, at the trial following, consistently ruled that evidence of the respondent attempted to be offered on such matters was beyond the scope of the issues formed by the pleadings and was inadmissible to prove such a claim. The petitioners relied on these rulings and confined their defense and proof to the issues tried by the District Court. (T. 57-58).[3]

After deposing the respondent on August 28, 1974, thereby first learning of the factual contentions of the respondent (except of the abortion learned earlier), petitioners filed for summary judgment supported by affidavits of each medical person and their Division superior of City Hospital No. 1, gynecological and obstetrical service, who had treated the respondent, and the complete medical documentary record of the hospital regarding the respondent. These contradicted the claims, affidavit and deposition of the respondent. The Court, on November 20, 1974, denied both the respondent's and petitioners' motions for summary judgment and ordered trial on November 25, 1974.

---

[3] References to typewritten transcript of the trial.

Upon trial without a jury on November 25, 1974, the case was presented in less than a full day, with a long noon recess (to accommodate respondent) and an early afternoon adjournment.

Respondent, through the Mayor and Doctor Wochner (Director of Health and Hospitals and Acting Hospital Commissioner) established that the policy or rule, existing for years pursuant to Missouri State law against abortion other than to save a mother's life, was directed to be continued to Doctor Wochner by the Mayor sometime in May 1973 after his election in April of that year. As understood by the Mayor and Doctor Wochner, the question of jeopardy to the mother's life was a medical decision to be determined by the patient's attending physician. Intensive discussions were occurring between them up to the time this suit was filed regarding the legal, medical and moral questions of the policy, and that litigation was going on in the State with attendant great public uncertainty. The Mayor has deep moral feelings against non-therapeutic abortions which was communicated to Doctor Wochner, but he (Wochner) believes abortion service ought to be given at the City's hospitals. (T. 6, 7, 10, 20-26). Because of the continuing discussions and the Mayor's feelings, Doctor Wochner did not implement the installation of such service. (T. 30-31). Doctor Wochner had weekly or biweekly conferences with his hospital medical cabinet at which the status of these discussions was reported, but the only person he informed in writing regarding such policy was the president of his medical staff. No general directive was made. (T. 26-27). The working physicians and medical students, of City Hospital No. 1, gynecology and obstetrics Division No. 2, service, who came in personal contact with respondent, were not informed of such policy, nor was the chief of their said Division. And each testified that it was not a factor in their treatment of her. (T. 49, 50, 85, 91-95, 101, 104, 108, 113-119). Further, neither of the hospitals by-laws dealt with abortion. (T. 39).

The respondent's evidence demonstrated that the City's hospitals have an organic medical staff. Private physicians are not allowed to admit or treat patients in them. Each hospital patient is a patient of the City treated by City hospital physicians. The City's hospitals are also medical instructional institutions having teaching relations with the two medical schools in St. Louis, namely, St. Louis University, a Jesuit, Catholic institution, and Washington University (formerly sectarian but is now nondenominational). Medical school teaching professors are furnished as staff instructors in many of the services of the City's hospitals and in some services medical students receive some of their clinical instruction. (T.31-33.) The Ob-Gyn service at City Hospital No. 1 is staffed by physicians and attended by medical students affiliated with St. Louis University Medical School. (T. 33.) Respondent attempted to prove the physicians at City Hospital No. 1, practicing in Gyn-Ob Division No. 2, were prohibited through their affiliation with St. Louis University Medical School from performing non-therapeutic abortions at the Hospital before medical students. However, the Court overruled such attempts and admitted the personal professional, ethical, moral and religious views of such physicians as material to their theoretical interpretation and execution of the contested claimed policy. (T. 57-58.)

The proof relating to respondent's factual relations was provided by her medical record kept by the Hospital (Resp. Ex. No. 2), the testimony of the Hospital medical personnel who treated her there, and her account of the same occurrences.

The medical record and the medical personnel agreed that she had a long history of treatment at the Hospital starting in 1963 when she was 17 years old. Immediately relevant to this suit she made a visit on August 7, 1973, at age 26, to the Gyn Clinic complaining of vaginal infection about which she had visited the Clinic about a month before. She also stated she thought she was pregnant and, if so, wanted to know the fetal

age for a possible abortion with "Planned Parenthood." (T. 86; Exhibit No. 2.) Examination by a third-year medical student (under general supervision) indicated suspected pregnancy, vaginal infection, some small polyps in her cervical canal, and retroverted uterus. Her general condition of health was good. Routine laboratory tests were ordered including a pregnancy test; and she was given a future appointment to Gyn for August 13, 1973, to learn the outcome of the tests. She was also given medicine for the infection. No medical indications for abortion were observed (T. 85). She did not indicate she wanted an abortion at the City Hospital (T. 88).

On August 13 1973, respondent returned to the Gyn Clinic where she again was treated by another third-year St. Louis University medical student. She was immediately told the test specimen of August 7, indicated she was pregnant. Whereupon she became very distraught saying because of the possibility of her husband going to prison she wanted a hysterectomy and an abortion (T. 96). The student then consulted with a physician superior who directed that she be given an appointment at the Obstetrics Clinic (T. 94). Because of her upset condition he gave her an appointment to the Ob Clinic for the next day, August 14, 1975. He found no medical indications for abortion or hysterectomy (T. 91, 94-95), and that, at the time, he was unaware of any City hospital policy against abortion (T. 97). He advised respondent that, under health circumstances, he knew of no physician at the hospital who would perform an abortion for the reasons she related (T. 96-97).

On August 14, 1973, she returned to the OB Clinic of the Hospital and was there received by a staff physician who initiated a usual past history investigation when the respondent interrupted to ask if such was necessary since she was there only for the purpose of securing a statement of the length of gestation for possible cessation at another facility (T. 101). He told her that because of his personal ethical, professional, moral and

religious beliefs, where she had no medical indications for abortion (T. 102 and 104), he would not give her such a statement to be used for abortion, but would refer her to another physician (whose beliefs he did not know) who might give her the statement she desired (T. 102). He, too, was unaware at that time of any City hospital policy against abortions. (T. 107-108).

Immediately, respondent was referred to Dr. Ziad Abu Dalu, a graduate of the medical school of the University of Cairo, Egypt, who on the occasion was affiliated with St. Louis University since 1972, and a resident physician at the City Hospital (T. 110). During Doctor Dalu's initial interview of her she told him of her personal reasons for wanting to abort her child, amongst which he remembered was the possibility of her husband going to jail. She told him she had been to "Planned Parenthood" and had been asked to pay $175 for an abortion which she couldn't afford and, therefore, wanted the abortion from City Hospital (T. 112-113). He told her "we couldn't do one at City Hospital and I didn't explain to her my personal reason or otherwise." (T. 113). He testified that the reason he told her this was because in his medical judgment an abortion was not medically justified under her circumstances (T. 113, 118-119). He was aware of the University policy regarding abortions but not of a policy of the City (T. 118-119, 123). He gave her the certificate of fetal age she had requested (T. 116-117); such certificate was later tendered to the abortion clinic for the August 22, 1973, abortion, and procured from its records (T. 79 and 82; Exhibit B). Respondent appeared again at the Hospital OB Clinic the next day (August 15, 1973) and was immediately referred to Doctor Dalu on her claim of bleeding from the vagina. He found her claim to be false (T. 114).

Respondent's testimonial version of the same occurrences was markedly different in several material respects. She claimed, contrary to the medical personnel, that she initially went to the Hospital to secure an abortion there. Whereas, the medical rec-

ords made at the time and introduced by respondent clearly recite that her initial purpose was to determine pregnancy and fetal age for use at another facility (T. 36, 64-66; Exhibit 4). She also attributed the physicians refusal to abort her as being based by them on a City policy against abortions (T. 67, 70 and 72). She attributed to Doctor Dalu advice that he would perform an hysterectomy on her at the Hospital after she was aborted elsewhere (T. 73). Whereas, none of the City physicians found any medical reasons for removal of her reproductive organs (Exhibit 2).

The District Court found that each medical student and physician who examined respondent at the City Hospital found no medical reason for aborting her and that such medical decision was based upon the opinion of the medical person uninfluenced by any policy of the City regarding abortions; and that none of them knew of any such City policy. The Court declared Section 197.032, Revised Statutes of Missouri, to confer the right upon these physicians (inter alia) to be free from any lawful coercion to perform abortions in the City's hospitals against his personal beliefs, and that the respondent did not challenge the physicians' actions under such statute. The District Court recognized a qualified Federal constitutional right of respondent to an abortion, but declared she had no right to demand that the City's physicians accede to her wish or the City so accede, where no medical reasons existed. The Court found no design or purpose of the City to deny respondent any of her Federal constitutional rights.

The respondent appealed such decision to the Court of Appeals (C.A. 8th Cir.). The points raised before the Court were: 1, whether the District Court erred in ruling that the Complaint did not put in issue the City's procurement of physicians from a religious denominational medical school; 2, if the District Court erred in so construing the Complaint, whether the proof established a violation of respondent's Federal constitutional privacy rights regarding abortion because of the procurement of a medical staff possessed of professional beliefs against non-medically indicated abortion; and 3, whether, if respondent prevails, attorney fees on the basis of her acting as a "private attorney general" ought to be awarded.

Petitioners vigorously defended against these contentions pointing out that respondent utterly failed to even point out or isolate any "clearly erroneous" findings of the District Court, and was asking for a trial *de novo* at the appellate level. The failure of respondent's proof within the issues framed by orders and rulings of the District Court was also urged; and the lack of an unlimited right in the respondent to demand an abortion contrary to the decision of the physicians was argued.

The Court of Appeals, determined that the District Court erred in construing the Complaint to exclude the issue of medical staff procurement, and held that the proof established that the City's Mayor, through the combination of his policy against non-therapeutic abortions and the physician procurement practice, denied the respondent her constitutional rights regarding abortion. The Court also found that reasonable attorney fees for the appellate stages of the litigation were $3,500, and awarded such sum to the respondent for acting as a private attorney general in securing the Federal constitutional rights denied by the Mayor; further, the Court ordered the District Court to determine and award reasonable attorney fees on the same basis to respondent, against the petitioners, for the trial phase of the case. Injunctive relief was awarded against the petitioners, requiring them to secure physicians who have no objections to performing non-therapeutic abortions.

Petitions for rehearing and for rehearing *en banc* were filed by petitioners which, while being denied, resulted in first modification of the Court's judgment striking the injunctive relief and substituting the same declarations of immediate constitutional duty as declaratory relief.

Thereafter, in due time, petitioners moved the Court to strike its award of attorney fees as unauthorized because the Federal statutes sued on, did not authorize such awards. At this time the respondent moved the Court to allow such fees on the basis of the "bad-faith" of petitioner Mayor Poelker. Such fees were so allowed by a second modification of the judgment. At the time of such order of modification, a right to file a second petition for rehearing and rehearing *en banc* was granted petitioners. Such second petitions were made and denied.

Upon remand to the District Court a hearing was held to determine the amount of reasonable attorney fees to be awarded according to the mandate. The District Court, applying the guidelines of a case cited as to be followed by the Court of Appeals, found the sum of $9,317.50 as a reasonable fee for the trial stage services, but on stipulated evidence showing no agreement to pay any fees by respondent, did not adjudge such sum against the Mayor. The respondent has appealed this judgment to the Court of Appeals.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. Abortion on Demand

This case presents the clear-cut question of whether a woman has a Federal constitutional right to demand that a municipality abort her pregnancy contrary to the medical opinions of its municipal hospital staff physicians treating her. This question has not been ruled by this Court, and due to the overwhelmingly common practice of great urban public hospitals of providing their own publicly employed physicians and the consequent massive incidence of the problem, the question is of great and immediate National importance calling for settlement by this Court. Because the question occurs in a governmental setting, resolution must necessarily deal with not only the Federal constitutional privacy rights of women, but implicates a State's social structure of the Family so far as a municipality is presented with law and factual aspects of such institution to which it must routinely accommodate, and the most fundamental civil rights of publicly employed persons, grounded in the Federal and State constitutions and State statutory enactments.

The Court of Appeals opinions sanction such an abortion demand (albeit couched in less stark terminology) but utterly fail to deal with the inescapable implications of its decision, and more, grossly castigates and severely punishes a public official for recognizing and raising such matters for the Court's resolution. Fidelity to public office impels our giving this Court opportunity to redress matters and give controlling future direction.

To appreciate the reach and practical effect of the Court of Appeals opinions it is vital to recognize that most very large, urban, municipally-owned general hospitals are organized as complete, self-sufficient medical treatment facilities. Private

practitioner physicians have no patient admission arrangement with the hospital and are not allowed to practice in the hospital. Such public hospital has its own, full-time organic staff of physicians who are in the employ of the city and commonly processed through civil service procedures just as are other categories of municipal employees. This is the situation here. (T. 31-33; see Charter of St. Louis, Art. XVIII.)

Entrance to such a hospital by the patient is not through a physician. The patient makes the first contact with the hospital itself. Normally such entrance is made through the hospital's various clinics or the emergency room service. The patient is assigned according to his health needs to a category of medical and hospital administration service where he then encounters the physicians associated with that service. Charges for these physicians' services are made by and owing to the hospital (i.e., the city) and not to any physician that might have performed them. His compensation is a legislatively determined salary. (T. 31-32)

The physician chiefs of these various services not only perform an administrative function at the hospital, but customarily perform a teaching or instructional role respecting the lesser experienced physicians and medical students from a medical school having an arrangement with the city. This dual function gives rise to a dual position; other than the treatment hospital role, the chief will normally also have a professorial position with the medical school (or schools) so associated. (T. 41.)

This Court, in the context of State criminal law statutes, made plain that a woman's right regarding an abortion of her pregnancy is a limited one—not absolute. (*Roe v. Wade*, 410 U.S. 113, l.c. 154 (S.Ct. 1973), and *Doe v. Bolton*, 410 U.S. 179, l.c. 189 (S.Ct. 1973).) Such right essentially is to be able to secure the services of duly accredited physicians who, free from state interference or criminal sanctions, consult with her to be

advised of her particular health circumstances as they affect the medical decision of whether to perform an abortion on her.[4] The ultimate decision is not the woman's but the physician she has consulted with. (*Roe v. Wade*, supra, l.c. 163 and 164.)

The range of considerations may be practically unlimited, but those that may be relied upon by the physician in making his "abortion decision" have not been mandated by this Court. (*Roe v. Wade*, supra, l.c. 163; *Doe v. Bolton*, supra, l.c. 192; *United States v. Vuitch*, 402 U.S. 62, l.c. 71-72.) The physician, if in fact he is to make the decision and not the woman, must be free to exercise his "best clinical judgment." While the Court has recognized an expended scope to the physician's health considerations theretofore limited by State criminal statutes, it has likewise refrained from imposing a constitutional scheme of medical values and left such matters to the realm of the science and art of medicine.

The Court of Appeals has ignored this all important role the physician plays in the constitutional plan for the operation of the woman's limited rights in the abortion privacy rights area. The Court of Appeals presupposes that the range of valid medical considerations that may properly enter into the "abortion decision" of the physician are equivalent to or define a woman's right to be aborted. This is to say: she has a right to be aborted by an attending physician because the range is so all-encompassing there is no real possibility that she can't assert one or more as subjectively important to preserve her health. This entirely motivates the judgmental function of the physician and shifts the causitive factor to the "wish" or "desire" of the woman as repeatedly mentioned by the Court of Appeals.

---

[4] It appears to be arguable whether the length of gestation is a considerable factor at all where preservation of maternal health is presumably a constant valid medical consideration at all periods, and is so broadly inclusive as to have no practical limitations whatever.

That this is so is abundantly demonstrated by the Court of Appeals centering its attack upon the ethical and presumed religious views of the physicians treating the respondent. (*Doe v. Poelker*, 515 F.2d 541, l.c. 543-544 (C.A. 8th Cir. 1975.) In inspecting this aspect of its reasoning it is crucial to keep in mind that the City hospital physician staff of the Gyn-Ob Departments were admittedly *not* assembled in any way or time relationship to the Supreme Court's decisions regarding abortion, but were the product of long existing cooperation between the City and St. Louis University Medical School.[5] On appeal respondent expressly admitted this which was never really in dispute. (See: *Appellants'* [respondent's] *Statement, Brief and Argument*, p. 18.) Neither this Mayor nor his predecessors played a direct or indirect role in physician procurement. (T. 31-32.) The Court of Appeals opinions make clear that a woman going to the City's hospital after having determined to be aborted, must be supplied with a physician to carry out *her* decision. Such a legal conclusion is explicit in the Court's remark (*Doe v. Poelker*, supra, 515 F.2d l.c. 544):

> * * * Likewise, it is clear that the staffing procedure effectively foreclosed any possibility that a pregnant woman could ever find a staff physician who would agree to perform an abortion in the city hospital unless her life or health was in severe danger. * * * (Emphasis supplied.)

Again, the express declaration of the Court of Appeals that the "method of staffing" is unconstitutional and directing that the City "* * * obtain the services of responsible physicians and other necessary personnel whose views on abortion do not prohibit them from providing an abortion * * *," positively interjects the City into the "abortion decision" by requiring an ethical, moral and religious test of physicians so as to meet the

[5] The other local medical school, Washington University was similarly involved, but through the years reduced its participation so as to adequately staff its private University associated hospitals.

demand of the woman to be aborted (*Doe v. Poelker*, supra, 515 F.2d l.c. 546). Contrary to the teachings of *Roe v. Wade* and *Doe v. Bolton*, supra, the woman is vested with a right to "shop" the medical staff so as to find a compliant physician who will abort her for any "health" reason she asserts. And the City is required to insure that they are available to be found. The Court has disqualified the present physicians from practicing regarding the health of City hospital pregnant patients strictly because their medical views are influenced by their ethical professional views, or their moral opinions, or their religious beliefs. This is a new, novel and startling intrusion into the practice of medicine and, if practiced by the State outside the context of judicial coercion, would be most certainly within the prohibitions denounced by this Court in *Roe v. Wade*, supra, 410 U.S. l.c. 163, and *Doe v. Bolton*, supra, 410 U.S. l.c. 216. The Court of Appeals has effectively intruded where all others are barred. There hardly, at this time, need be a labored exposition of the fundamental United States First and Fifth Amendments' constitutional violation implications for such physicians and the City is dealing with them. The Court of Appeals has rejected the truth that it is just as valid a medical position to believe that non-therapeutic abortion is medically unsound.

The institutionalization of "abortion on demand" is certainly contrary to the reasonable import of this Court in *Roe v. Wade* and *Doe v. Bolton*, and expressly so declared by the Chief Justice in his concurring opinion. (*Roe v. Wade*, supra, l. c. 207.)

II. Appellate Abuse of Discretion

1. Overturning District Court's Findings.

Petitioners seek Supreme Court review (under its Rule 19 (b) superintending powers) of this case on the basis that the Court of Appeals, in its adjudicatory powers departed so far from

common standards of fairness and impartiality of judicial practice that, in order to preserve important public rights in this litigation and to preserve future judicial regularity through precedent, intervention by this Court is required.

Nothing need be said to add to the Court's history of insistence upon fairness and impartiality in the judicial process according to the requirements delineated for due process of law as declared through the Fifth Amendment (and Fourteenth) of the Constitution of the United States, and formally recognized by Rule 52(a), Federal Rules of Civil Procedure. We urge that the appellate record of this case most forcibly brings these principles to the fore for application once again.

An examination in some detail of the Court of Appeals' first opinion (April 14, 1975) gives a clear exposition of the manner that Court totally vitiated an adversary trial, rendering nugatory the District Court's findings and assessment of the believability and accuracy of the witnesses and documents; and thereafter, finally reversing, granting injunctive relief it later had to withdraw; and severely convicting and punishing the petitioner Mayor on the untried issue of "bad-faith" after being obliged to abandon an earlier attorney fees award on a "private attorney general" basis.

An impossible impediment the Court of Appeals logically first had to overcome before it could disagree with the findings of the District Court and then finally reverse, involved the inclusion of issues raised by the Complaint. The District Court's findings and judgment, reviewed according to the construction placed on the Complaint by the District Court and so tried by it, were unassailable. The evidence amply supports the findings and the trial court had seen and heard the sources at the hearings as to better determine truth upon conflicts. To overcome this, the Complaint had to be reconstructed to permit appellate trial *de novo*.

The District Court, shortly before trial, upon respondent's attorneys' inquiry,[6] ruled that as the Complaint stood, attempted proof by respondent into the professional ethics, morality, or religious beliefs of the physicians at the Gyn-Ob Department of City Hospital No. 1, or physicians respondent was treated by, would only be material to the Complaint for the limited question of whether the so-called "Mayor's" City abortion policy in fact biased or interfered with the personal medical opinions of the City physicians and medical personnel who had treated the respondent. Evidence going to proof of staffing with physicians of a certain medical, ethical, moral or religious belief was ruled beyond the scope of the Complaint.[7]

The uncontroverted record showed that the attacked policy continued by the Mayor and which petitioner Wochner did nothing substantial to enforce, was *not* the cause for the City physicians refusing to accede to the respondent's request to be aborted. As a consequence, "clearly erroneous" findings, under the trial court's construction of the Complaint were nonexistent.

At appeal, the respondent had failed to point out any erroneous findings (clear or otherwise) of the District Court, and attacked the aforesaid construction of the Complaint, arguing the physicians' medical school affiliation as an interference with her constitutional rights.

The Court of Appeals, without averting to the lawful scope of review commanded by Rule 52(a), Federal Rules of Civil Procedure, first isolated the crucial findings of the District Court regarding the refusal of the physicians to abort respondent, then

---

[6] And after they had shortly before first seen the City physicians' and medical students' affidavits (supporting summary judgment motion of petitioners) disclaiming any knowledge of the City's abortion policy and attributing their refusal to abort respondent to an absence of medical indications.

[7] The Court offered to permit the respondent to amend the Complaint so as to include such issue, but this was never done.

substituted its *ipse dixit* findings to the effect that the "Mayor's policy" in *combination* with the staffing of physicians from a Catholic medical school, was unconstitutional in violation of respondent's rights. For the most part such substituted findings are merely supported by the Court of Appeals gratuitous assertions that such conclusions are "strongly indicated," "strongly suggest[ed]," "indicated," or "stripped of all rhetoric."

The underlying legal basis for this appellate *trial de novo* is relegated to a footnote declaration (slip opinion, April 14, 1975, p. 5, footnote 4; Appendix) that the words in the Complaint "procedures and practices," are broad enough to raise an issue of whether the City's past history of physician procurement was a means to denying non-therapeutic abortions. The *non sequitur* that the Federal Rules of Civil Procedure (Rule 8(f)) provide that pleadings shall be construed to do substantial justice is cited without attempt at justifying its application against petitioners. The fairness (e.g., "substantial justice") owing to the petitioners is passed over with a bootstrap observation that they "could hardly complain" of surprise "in view of the broad wording of the [C]omplaint, [a]nd when Doe [respondent] put on evidence relating to staffing, the City [i.e., petitioners] did not ask for a continuance or attempt to offer any contrary evidence of its own."

The gross unfairness of this treatment is substantiated by the fact that it would be impossible to "complain" about the Court of Appeals' reconstruction of the Complaint in the trial court before it occurred; and the "evidence" thus created by the Court of Appeals, was at the trial stage admitted for another purpose and *excluded* for the purpose seized upon by the appellate court. The potential logic of the petitioners in the trial court *asking for a continuance or offering contrary evidence* (when the District Court had not only at pre-trial conference excluded such issue as a matter for trial, but also faithfully adhered to such ruling throughout the trial (T. 58 and 60)) is nonexistent, and presents no unusual phenomenon because it was not done.

This reconstruction of the Complaint by the Court of Appeals is mystifying when it is considered that the same court, with the full original record before it; entertaining extended oral argument; failed itself to see such additional meaning of the two words "procedure and practice" in the Complaint on the prior appeal, and itself then construed the meaning and reach of the Complaint just as the District Court did. (See: *Jane Doe, et al. v. John H. Poelker, etc., et al.*, 497 F.2d 1063 (C.A. 8th, 1974).) All of the interrogatories, memoranda, and the brief of the respondent in the first appeal, also construed such language as singularly referring to the Mayor's statement against non-therapeutic abortions as the "policy" attacked. It was only after respondent foresaw her nonsuit on such issue shortly before trial that the "staffing" issue was attempted to be raised.

The *hiatus* of any proof of a "combination" of the Mayor's policy with the "staffing procedures" relied on by the Court of Appeals as a denial of a constitutional right is patent and stark. (See: *Doe v. Poelker*, slip opinion, April 14, 1975, p. 6; Appendix.) Here a failure of the respondent's mere promise of later proof is utilized to adopt a far reaching conclusion (T. 61);[8] similarly, the grossly conjectured finding that the policy and staffing procedure were effective to thwart respondent (and other women) from securing abortions, is not sustainable on the ground that abortions were not performed. The Mayor's "policy" is but a continuation of a command respective of Missouri law, and the "staffing" procedure antedated any question of abortion.

All of this is given devastating impact when it is recalled from the record that the respondent, as a litigational strategy,

---

[8] Contrary to the respondent's promise, no such evidence was later produced.

attempted to withhold the facts of this case from petitioners and took the positive step of filing a false affidavit deceiving the District Court and the petitioners; and continued such strategy until forced to make disclosures. Opposed to this conduct of the respondent we invite a comparison with petitioners' acts throughout.

Rule 52(a), Federal Rules of Civil Procedure, set the parameters within which the Court of Appeals should have proceeded. This rule commands that the District Court's findings ought not to have been set aside unless clearly erroneous, and that due regard was to be given to the trial judge's opportunity to judge the credibility of the witnesses. The Court of Appeals had no warrant to try the case *de novo. United States v. United States Gypsum Co.*, 333 U.S. 364, l.c. 395. The efficacy of the District Court's inferences from undisputed basic facts (e.g., denial of abortion was a matter of independent judgment of the physicians) was to be respected by the Court of Appeals. *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, l.c. 291. The Court of Appeals was required to indulge the District Court the presumption that its findings were correct and it was the duty of the respondent to clearly demonstrate error in such findings. A reconstruction of the Complaint, after trial, does not satisfy this duty. Possibly no fairer statement of the position of an appellate court on review can be made than that of the Court of Appeals itself in *Pendergrass v. New York Life Insurance Co.*, 181 F.2d 136, l.c. 138 (C.A. 8th, 1950):

> The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions

> of the district courts, and multiplies the number of appeals in such cases. * * *

The Court of Appeals has, until late, consistently adhered to its foregoing view of the meaning of the Rule 52(a) and expressly declared that it has no discretion to try a case *de novo; Parke-Davis and Co. v. Stromsodt*, 411 F.2d 1390 (C.A. 8th, 1969); *Birdwell v. Hazelwood School District*, 491 F.2d 490 (C.A. 8th, 1974)

This appellate course completely voided an adversary trial conducted below and put the Court of Appeals in the position of, once having materially changed the issues of a trial completed on another basis, trying the case anew without according petitioners any opportunity to meet such markedly changed situation.

2. Court of Appeals initiation of petitioner Mayor's conviction of "bad-faith" and imposition of punishment by levying "attorney fees."

Any question of petitioner Mayor's "bad-faith" and punishment therefor first arose and was decided against petitioner in the Court of Appeals. The issue was never raised in the District Court, no trial of such matters was there had and the District Court awarded judgment for the petitioners, against the respondent with prejudice. The Court of Appeals in its original opinion of April 14, 1975, on respondent's suggestion in her brief, granted an allowance to her against Mayor Poelker of $3,500 for the "appellate portion" of the litigation, and also made an award in her favor against the Mayor for trial attorney fees, in an amount to be determined on remand of the outright reversal of the District Court. The settled basis for these awards was the appellate court's conclusion, that under its "equitable powers" such fees could be

awarded because the respondent had acted as a "private attorney general." The Court specifically rejected respondent's suggestion of the alternative ground of bad faith. (See: slip opinion, April 14, 1975, p. 13, footnote 8; Appendix.)

Since there existed no statutory authorization for these Court of Appeals awards, and the matter was one not litigated below, petitioners moved the Court to strike such findings and the awards based on them, suggesting the applicability of the recent case of this Court, *Alyeska Pipeline Service Co. v. Wilderness Society*, — U.S. —, 95 S.Ct. 1612, 44 L.Ed.2d 141 (S.Ct. 1975), as controlling.[9] The respondent concomitantly moved the Court to deny the motion and sustain the awards on the suggested bases of "willful violation of court orders" and the "bad-faith" of petitioner Mayor Poelker.

In response to petitioners' motion, the Court of Appeals again modified its opinion striking the awards of attorney fees on the basis of private attorney general but adopted the respondent's suggestion to make the same awards on the basis of "bad-faith." (See: Order, June 2, 1975; Appendix.)[10]

We urge that these judicial acts are without authority and constitute a flagrant abuse of discretion.

---

[9] This was the second occasion petitioners were required to move the Court of Appeals to correct erroneous awards against them. Prior, on oral argument (second appeal) before Div. No. 2, upon one of the judges initiation of discussion of the nature of mandatory injunctive relief to be awarded against petitioners, petitioners there pointed to the record showing that the respondent had stricken her prayer for such relief and called upon her attorney to concede the same which he did. None-the-less, in its judgment (slip opinion April 14, 1975; Appendix) the Court made such an award of injunctive relief. On petition for rehearing, the Court, *en banc*, on May 7, 1975, modified the divisional opinion so as to eliminate the terms "injunctive relief" at each occurrence and substitute therefor the words "declaratory relief." (See: Order, May 7, 1975; Appendix.)

[10] Presumably because of a total lack of any foundation in the record for conjecturing "willful violation of court orders" (suggested by respondent), the Court makes no mention of such basis.

The stated ground for the conviction of petitioner Poelker of "bad-faith" and making the several awards as punishment, is the Court's supposition that the law was so clear after the United States Supreme Court decided *Roe v. Wade* (supra) and *Doe v. Bolton* (supra) in 1973, and the Court of Appeals had decided *Word v. Poelker*, 495 F.2d 1349 (C.A. 8th Cir., 1974) and *Wulff v. Singleton*, 508 F.2d 1211 (C.A. 8th Cir., 1974), that any defense against the respondent's claims (as reconstructed by the Court of Appeals) was frivolous and insubstantial, demonstrating "a wanton, callous disregard for the constitutional rights of indigent pregnant women continuing long after those rights had been clearly enunciated by the Supreme Court in *Roe v. Wade*, supra, and *Doe v. Bolton*, supra."

This is an untenable position. Neither *Roe v. Wade* nor *Doe v. Bolton* decided that municipal hospitals must furnish women "wishing" or "desiring" non-therapeutic abortions with physicians and facilities to carry out their wish. These Supreme Court decisions dealt strictly with the resolution of a woman's personal right as measured against the State's rights under the criminal law. (The correlative rights of physicians were, of course, dealt within the same context.) These *Roe* and *Doe* opinions simply do not address the issue of municipal provision of physicians to perform abortions for either indigent women or women with means. It would have been more understandable if the Court of Appeals had reasoned from these cases by analogy to decide this case recognizing that the Supreme Court has not decided the question presented here; however, even such a course could not jurisprudentially excuse the Court of Appeals' abuse here because the issue was *not* the meaning of *Roe* and *Doe* but the petitioner's "bad-faith" in not interpreting these cases as the Court of Appeals ultimately did! At the very least it can be said that reasonable men can differ on the application of *Roe v. Wade* and *Doe v. Bolton* to the present case. And if this be so it is manifestly unjust to convict a litigant for seeing the situation differently than the Court of Appeals.

The Court of Appeals cites as additional evidence of petitioner's bad-faith its decision in *Wulff v. Singleton*, 508 F.2d 1211 (C.A. 8th Cir., 1974), as instructive of the law applicable to this situation and to be presumed known to the Mayor. The observation is as follows (slip opinion, April 14, 1975, pp. 8-9; Appendix), viz.:

> In the recent decision in Wulff v. Singleton, supra, 508 F.2d at 1215, the state of Missouri had by statute prohibited medicade payments to women receiving welfare benefits who had undergone nontherapeutic abortions while, at the same time, providing such payments to women welfare recipients who carried their pregnancies to term. This Court stated: "This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment." *There is no practical distinction between that case and this one.* (Emphasis added.)

As can be seen, the *Wulff v. Singleton* case involved construction of Title XIX of the Social Security Act; that is, Federally provided funds administered by the State. Not the question of *whether* the Federal or State government were constitutionally required to provide such funds for "indigent women." As a consequence, the analogy is rather distant from the case of whether a municipality must recruit compliant physicians for pregnant women "desiring" abortions. Further, the force of the Court of Appeals' reasoning is all but destroyed by the express disagreement other United States Courts of Appeals have had with *Wulff v. Singleton*. In *Roe v. Ferguson*, — F.2d —, the Court of Appeals for the Sixth Circuit (Slip opinion, filed April 28, 1975, in No. 74-2195), at pages 9-10 of its opinion stated in part:

> We find ourselves, therefore, in disagreement with the Eighth Circuit's ruling in *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974), that the unconstitutionality of this type of statute is so "obvious and patent" as to obviate the need for a three-judge court.

The Second Circuit has also lately disagreed with the holding of *Wulff v. Singleton*. In *Roe v. Norton*, — F.2d —, (slip opinion, decided July 31, 1975, in No. 74-1874), the Court observed that *Roe v. Wade*, supra, and *Doe v. Bolton*, supra, did not deal with the question of a State's right to restrict payments for abortions under social welfare programs such as Medicaid, and "despite lower court decisions holding such restrictions unconstitutional, it cannot be said that this issue has been put to rest by the Supreme Court." The Court (C.A. 2d Cir.) stated it agreed with the Sixth Circuit and disagreed with the Eighth Circuit on this question. Emphasis is added to the lack of "foreseeability" of the law applicable to Mayor Poelker by the Supreme Court's granting *certiorari* in *Wulff v. Singleton*, supra (cert. granted 43 L.W. 3674, June 23, 1975).

Moreover, the District Court's twice granting judgment for petitioners is destructive of the Court of Appeals' postulate that the law was so "clear" or "clearly enunciated" or "clear dictates of the Supreme Court" that petitioner Poelker was in "bad-faith" in not adhering to it or in defending against the respondent's claims.

The reliance of the Court of Appeals on the several cases litigated in Missouri as a demonstration of the Mayor's adjudicated "bad-faith" also fails upon objective inspection. *Word v. Poelker*, 495 F.2d 1349 (C.A. 8th Cir. 1974) and this case are cited to sustain such found history of "obstinancy." Of course, the Court's characterization of the Mayor's conduct is the very matter disputed here; but the case of *Word v. Poelker* (supra), merely involved the City's defense of an ordinance regulating (e.g., not prohibiting) abortion clinics. This could not, with accuracy, be considered as evidence of a:

> wanton, callous disregard for the constitutional rights of indigent pregnant women continuing long after those rights had been clearly enunciated by the Supreme Court in Roe v. Wade, supra, and Doe v. Dalton, supra • • •

as found by the Court (see: slip opinion modification Order, June 2, 1975, p. 13).

Mr. Chief Justice Burger in *United States v. 12 200-Ft. Reels*, 413 U.S. 123, l.c. 127, gave pointed warning against too easy extension of a rule to new dissimilar situations:

> * * * The seductive plausability of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

The law declared by the Supreme Court does not seem, in rational application, to warrant the conviction of Mayor Poelker of bad faith and authorize such a severe condemnation and punishment.

It is clear and beyond cavil, that actual "bad-faith" practiced by a litigant in the course of litigation can be, and properly ought to be, punished. (*Alyeska Pipeline Service Co. v. Wilderness Society* (supra); and citations therein.) However, this laudable rule, under the perceived applications authorized by this Court, is not a device permitting arbitrary conviction and punishment without notice or hearing and capricious imposition for having a differing opinion in a new and very passion evoking field, or defending according to well recognized juridical norms.

The Supreme Court gave cogent evidence of the true meaning of the rule in *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (S.Ct. 1964). There the Court equated "bad-faith" with contempt. The same gravamen of the offense

is illustrated in the earlier case: *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (S.Ct. 1923). Particularly, in the *Universal Oil Products Co. v. Root Refining Co.* case the Court demonstrates its meticulous insistence that due process of law be accorded a person prospectively considered for punishment for "bad-faith."

Here we respectfully urge there are no facts relating to the conduct of the Mayor which could fairly be assayed as equivalent to a contemptuous disregard of the law; or an ignoring of anyone's rights under "ancient law" such as in *Vaughan v. Atkinson*, 369 U.S. 527 (S.Ct. 1962). Rather, there exists a *good faith* difference of opinion as to the law of this case, and an honest defense to contrary claims so that the matter can be resolved according to due process. In convicting petitioner Mayor Poelker of bad-faith and levying a fine upon him as "attorney fees" in the course of an appellate proceeding, the Court of Appeals has deprived him of that most fundamental right under the Fifth Amendment to the United States Constitution—due process of law.

III. **Justiciability, Standing and Mootness**

Petitioners respectfully urge that the justiciable case or controversy requirements of Article III, of the United States Constitution, fully sustain the District Court's final determination of mootness under the facts of this case.

The salient facts material to this question are simple and uncontested. The respondent filed her suit on August 17, 1973, against the two petitioners, for a mandatory injunction requiring petitioners as the primary executive officers having control over the City's hospitals, to cause to be simultaneously performed on her an hysterectomy operation and an abortion of her preg-

nancy, and for a declaration of law of like settlement for all similarly situated members of a class.[11]

The respondent, five (5) days after the filing of suit caused herself to be aborted (according to admission of counsel). No disclosure of such fact was made until six (6) months thereafter. The record is silent as to the occurrence of an hysterectomy as claimed to be simultaneously required by the Complaint.

At the time of the abortion of respondent on August 22, 1973, R. Dean Wochner, M.D., the second named petitioner, had not been served with a summons or the Complaint, and, of course, no responsive pleadings were required of either petitioner and no issues were as yet framed for trial.

The physiological fact of the abortion absolutely rendered the Complaint's prayer for respondent's personal abortion injunctive relief nugatory to try, and impossible for the Court to enforce, or the petitioners to obey. The only reason this anomalous status of the case did not timely appear was because of the respondent's imposed secrecy, her refusal to submit to discovery and a deceptive and false affidavit she filed.

Upon challenge, these facts argue irresistibly against the respondent's Federal standing to sue. At the threshold, the words of Mr. Justice Reed, spoken for the United States Supreme Court in *United Public Workers v. Mitchell*, 330 U.S. 75, l.c. 89, are appropriate:

> As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is true of declaratory judgments as any other field.

---

[11] The likelihood of many women existing locally to satisfy such a class appears to be negligible, if not nonexistent.

And in *United States v. Raines*, 362 U.S. 17, l.c. 21, the reiteration was couched:

> This Court, as in the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool, N.Y. & P. S. S. Co. v. Commissioners of Emigration, 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 352.

Standing to sue is a rational concept grounded in the imperatives of Article III of the Constitution and not a formal rule for administration of the Federal courts. As a substantive matter, going to jurisdiction, it must exist at each stage and throughout litigation of a case, although its aspects may vary or change during the progression of the case. As was said in *Flast v. Cohen*, 392 U.S. 83, l.c. 98, "Standing is an aspect of justiciability. . . ." Determinations of Federal standing focus upon the status and character of the litigant and not the claims sought to be adjudicated. Or as put by Mr. Chief Justice Warren for the Court in *Flast v. Cohen* (392 U.S. 99):

> The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon

which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 US 186, 204, 7 L Ed 2d 663, 82 S Ct 691 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question. A proper party is demanded so that federal courts will not be asked to decide "ill-defined controversies over constitutional issues," United Public Workers v. Mitchell, 330 US 75, 90, 91 L Ed 754, 768, 67 S Ct 556 (1947), or a case which is of a "hypothetical or abstract character," Aetna Life Insurance Co. v. Haworth, 300 US 227, 240, 81 L Ed 617, 621, 57 S Ct 461, 108 ALR 1000 (1937).

A generalized grievance or hypothetical vindication interest of a party is not enough to raise a constitutional duty for a Federal adjudication.

Further, it is abundantly clear that where the standing aspect of justiciability of a plaintiff ceases, the duty of a Federal court is clear. The case must be dismissed. Such a situation was squarely before the United States Supreme Court in *Golden v. Zwickler*, 394 US 103, where the plaintiff's relation to claims sought to be enforced (even though without any voluntary act of his own—contrary to the case here) changed to destroy standing. There the sequence of events unmistakably demonstrate that standing must exist throughout and not merely at the time of the filing of the Complaint. In the words of the Court (394 U.S. 108):

> The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to

that relief existed "[w]hen this action was initiated." The proper inquiry was whether a "controversy" requisite to relief under the Declaratory Judgment Act existed *at the time of the hearing* on the remand. We now undertake that inquiry.

> "[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field." United Public Workers of America v. Mitchell, 300 US 75, 89, 91 L Ed 754, 766, 67 S Ct 556 (1947). "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 US 270, 273, 85 L Ed 826, 828, 61 S Ct 510 (1941). (Emphasis added.)

At the conclusion of its opinion the Court again stresses this continuing requirement of standing in stated (394 U.S. 110):

> We conclude that Zwickler did not establish the existence *at the time of the hearing* on the remand of the elements governing the issuance of a declaratory judgment, and therefore that the District Court should have dismissed his complaint. We accordingly intimate no view upon the correctness of the District Court's holding as to the constitutionality of the New York statute. The judgment of the District Court is reversed, and the case is remanded

with direction to enter a new judgment dismissing the complaint. (Emphasis added.)

For the sake of concentration on the precise issue, since the respondent was pregnant at the time of the filing of her Complaint, it would appear that, at least as to this factor, she was possessed of standing at that time to seek an adjudication of her claims of infringements of personal constitutional rights as a *pregnant* woman seeking certain relief. Her personally sought redress was for a judicially coerced surgical operation upon her body for the removal of claimed diseased organs and destruction of the fetus in her uterus. Declaratory relief was incidental to and dependent upon such injunctive vindication.

However, the respondent caused her own abortion on August 22, 1973, at such early pre-trial time, she thereby completely obviated that "personal stake in the outcome of the controversy" and the quality of "sufficient immediacy and reality" to warrant any justifiable relief from the District Court. Of course, objectively the Court could not enforce her abortion: this she accomplished on her own. No judgment imposing such a duty on the petitioners to cause her abortion could have any real personal meaning for the respondent—her claimed legal relationship toward the petitioners had been irretrievably changed by her own doing. As far as her litigant status was concerned, the legal effect of her act in procuring an abortion was to destroy all possibility of ever establishing on hearing the fact of pregnancy upon which her claims depended. The effect could hardly be different in substance than a failure of proof on trial.

Just as in *Golden v. Zwickler* (394 U.S. 103, l.c. 109) where the Court pointed out that the situation giving rise to the complaint was most unlikely to ever reoccur (e.g., a judge resigning and again standing for election as a Congressman), here the respondent's pregnancy was past, and according to the recitals of her Complaint (p. 3, para. 11), the concomitant hysterectomy

she had determined upon, forever destroyed any future possibility of reoccurrence.

It will be noted that the Supreme Court in *Roe v. Wade*, supra, cited *Golden v. Zwickler*, 394 U.S. 103, as particular authority in support of its determination that Roe's case was possessed of the attributes of a Constitutional "case or controversy" and she was possessed of standing as late as May 21 (e.g., the day before trial), (410 U.S. 124). The patent holding in *Golden v. Zwickler* is the necessity of the existence of such a controversy at the time of the *hearing*—not at the time of filing. There can be no question whatever that Golden presented a case or controversy at the time of the filing, yet the decision of the Court was premised upon his standing *at the time of the hearing*—not the time of filing. (*Golden v. Zwickler*, supra, 394 U.S. 108 and 394 U.S. 110.) The litigant was held to have lost his admitted filing standing (i.e., "status") at the time of the hearing, and the case, in consequence, having lost its Constitutional case or controversy posture thereby.

It would appear just as compelling that when respondent lost her personal standing the class aspect of the suit was likewise vacated. Initially, respondent was the *sole* representative of a very nebulous class. Her person with its attendant personal characteristics gave justiciability to the suit. Once her status was changed, namely: no longer being pregnant and wanting an abortion and needing an hysterectomy, the case was without that "concrete adverseness" required for adjudicating the claims according to constitutional requirements of justiciability. *Baker v. Carr*, 369 U.S. 186, l.c. 204. As the Court instructed in *Baker v. Carr* (369 U.S. 208) justiciability demands more than "* * * merely a claim of 'the right, possessed by every citizen to require that the Government be administered according to law * * *'." The corollary is, of course, "* * * federal courts are without power to decide questions that cannot affect the rights of the litigants before them." *North Carolina v. Rice*, 404

U.S. 244, 246. Of late the United States Supreme Court has had occasion to point out that the alleged rights of a class cannot survive a circumstance which renders the only party litigant's claim moot. *Indiana Employment Division v. Burney*, 409 U.S. 540. (See also: *Linda R. S. v. Richard D.*, 410 U.S. 614, and *Bailey v. Patterson*, 369 U.S. 31.)

The question of Federal standing has been the subject of United States Supreme Court consideration in the late abortion case of *Roe v. Wade*, 410 U.S. 113. There the Court considered the status of justiciability and standing of each party appellant according to their several, separate situations. Further, it is crucial to note that the Court makes a fundamental legal distinction in its analysis between *trial* standing and *appellate review* standing.

At the Court's division "A" of its opinion (410 U.S. 124) the Court first addressed appellant "Jane Roe's" standing. The Court reviewed the significant sequence of the progress of the litigation with respect to her and concluded as a matter of fact that she was pregnant at the time of the hearing before the trial court. The unquestionable fact of this observation is established by the following quotations of the Court's opinion (410 U.S. 124):

> A. Jane Roe. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and *as late as May 21 of that year* when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.
>
> Viewing Roe's case as of the time of its filing, *and thereafter until as late as May*, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, *she, as a pregnant* single *woman*

> thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. Abele v. Markle, 452 F2d 1121, 1125 (CA2 1971); Crossen v. Breckenridge, 446 F2d 833, 838-839 (CA6 1971); Poe v. Menghini, 339 F Supp 986, 990-991 (Kan 1972). See Truax v. Raich, 239 US 33, 60 L Ed 131, 36 S Ct 7 (1915). *Indeed, we do not read the appellee's brief as really asserting anything to the contrary.* The "logical nexus between the status asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 US at 102, 20 L Ed 2d 947, and the necessary degree of contentiousness, Golden v. Zwickler, 394 US 103, 22 L Ed 2d 113, 89 S Ct 956 (1969), are both present. (Emphasis added.)

It can fairly be pointed out that in its canvass of the facts, the Court *found* that on May 21, 1970, which was the day before the trial hearing of May 22, 1970, Roe filed an affidavit of her *pregnancy*. The Court, absent any question about the matter, properly concluded it incredible that she was aborted over night especially where the trial record is silent regarding such a matter and the Court observes "Indeed, we do not read the appellee's brief as really asserting anything to the contrary * * *." (410 U.S. 124.)

After so fixing the factual context of Roe's situation at (and after) the trial hearing, the Court then turned to a consideration of her *appellate* standing. The immediate cause of this inquiry was the appellee's suggestion that (410 U.S. 124) "Roe's case must *now* be moot because she and all other members of her class are no longer subject to any 1970 pregnancy." (The case was argued December 13, 1971, and reargued October 11, 1972.) After pointing out that "[t]he usual rule in federal cases is that an actual controversy must exist at stages of *appellate or certiorari review*, and not simply at the date the action is initiated * * *" (410 U.S. 125, emphasis added), the Court pointed out that pregnancy, because of its relatively limited duration,

normally would not exist until the "appellate" process is completed. Because of this inexorable fact of life, the Court observed (410 U.S. 125) that "* * * If that termination makes a case moot, pregnancy litigation seldom will survive *much beyond* the *trial stage*, and appellate review will be effectively denied * * *." (Emphasis added.) For this reason, coupled with the normal biological phenomenon that the *same woman* repeatedly experiences pregnancy, the Court applied the "Continuing Controversy Doctrine" to demonstrate the existence of standing and "non-mootness" at the *appellate review* stage. The familiar apothegm—"capable of repetition, yet evading review"—is declared for emphasis, and four cases are recited as supportive.

In addition to the fact that the Court is speaking strictly about standing at the *appellate* stage, several other observations are pertinent. It will be noted that the buttressing authorities cited by the Court each concern the question of "mootness" or "standing" only at the *appellate* stage. (410 U.S. 125.) No question of "trial standing" or "trial mootness" was raised by the parties. Further, the decisional history of the "continuing controversy" exception relates to the *appellate* stage and not pre-trial situations. This is readily apparent from the long (and numerous) line of decisions dealing with the exception and its logical purpose. And, besides the Court expressly saying that it is dealing with mootness at the appellate stage, as before pointed out, at another part of its opinion when *sua sponte* discussing *trial stage* standing, it first finds the fact to be that Roe *was pregnant at trial* and cites prior decisions each requiring the actual status *at trial* to be as issuably pleaded in the Complaint as a basis for relief.

Here the doctrine of "continuing controversy" has no rational application. The question here is not respondent's *appellate* standing but her *trial* standing. There is no basis for or possibility of, "trial" of her Complaint as a pregnant litigant. This was absolutely foreclosed by her own voluntary act—*before trial*. The support of the United States Supreme Court points out for the pregnancy of Roe at trial by her affidavit is, of course, nonexistent here. As a matter of fact the opposite is true for the respondent's affidavit (in support of her motion for summary judgment) filed here, although at the time (October 5, 1973) apparently neither the District Court or petitioners noticed the absence of any positive recital of pregnancy such as was contained in the Complaint because of its otherwise false and deceptive nature.

Because of their use by the United States Supreme Court in the context of *trial standing*, the decisions cited in *Roe v. Wade* (410 U.S. 124) can be profitably referred to.

The first case cited is *Abele v. Merkle*, 452 F.2d 1121, l.c. 1125. This case markedly illustrates that in the context of contesting a claimed right to personal abortion, a woman must at least be pregnant. There the Court of Appeals said:

> Accordingly, we hold that non-pregnant female plaintiffs in this category do not show a sufficient nexus or present a sufficiently concrete issue in an adversary setting to give them standing, and we affirm the district court's dismissal of the complaint as to plaintiffs claiming standing solely on the basis of their child-bearing age.

At the outset the Court framed the issue of standing of the appellant lay women as a capacity to "present" a justiciable case. (See: 452 F.2d 1124, para. 1-3.) After reciting the controlling principles of "standing" and noting that none of this class of women were pregnant (according to their Complaint *and affidavits*), the Court ordered that the trial court's dismissal be affirmed with leave to amend the Complaint, only to women who *are pregnant*. In this context it is helpful to be reminded that courts do not adjudicate pleadings but *cases*, and this was the actual effect accomplished.

Citation of this case in *Roe v. Wade*, in the context of the Supreme Court's finding that "Jane Roe" was pregnant at trial, leaves no room for inference that the Supreme Court considered pregnancy at filing sufficient basis for standing where an abortion thereafter voluntary occurs before trial.

Crossen v. Breckenridge, 446 F.2d 833, is also consistent with petitioners suggested meaning of standing as explicated in *Roe v. Wade*. There the Court of Appeals of the case was within the frame of a denial of a complaint motion for appointment of a three-judge court by the District Court which determined a lack of standing and dismissed the complaint. As a consequence, the review of the appellate court was directed toward the record as it existed regarding the status of each party plaintiff at the time of the dismissal by the District Court. This status was solely and only discernible through inspection of the complaint since this was the extent of the record bearing on each appellant's "personal stake and interest," (*Barlow v. Collins*, 397 U.S. 159). The Court found that a pregnant woman (Pat Croddock) had standing, and a non-pregnant woman (Fran Pozzuto) lacked standing saying (446 F.2d 839):

> * * * It does not appear that this appellant presented more than a hypothetical case to the district court. Her only connection with the asserted right of marital privacy is that she may become pregnant in the future. This is not a sufficient nexus to distinguish her from any other woman capable of bearing children. No injury is alleged, actual or threatened, other than the hypothetical possibility that she may be denied an abortion should she become pregnant. Accordingly we hold that appellant Pozzuto does not have standing to challenge the Kentucky abortion statute under the federal Constitution. * * *

The same rule was applied to a women's rights organization. Parenthetically it can be noted that the "class status" of the dismissed out appellants did not lend justiciability or standing.

The third case cited in *Roe v. Wade* is *Poe v. Menghini*, 339 F.Supp. 986. This case contains the flat statement that the only two women involved as plaintiffs, Jane and Sally Poe, are "* * * at the time this action was commenced, were in need of abortions * * *" but unable to obtain them. (339 F.Supp. 989). The trial court (three-judge Dist. Ct.) fully heard the case and its recital of the facts gives every indication of the pregnancy of these women at trial hearing. The relief prayed for included injunctive relief relating to the inability of the women to secure a local legal abortion. While the Court did not mandate any specific relief to insure abortion, its reason was clearly *not because of the absence of pregnancy* of the concerned plaintiffs, but because the Court, in view of its declarations, felt injunctive relief to be unnecessary because of the presumption the defendants would comply with the declaration. Consequently, the case stands for the proposition it was utilized for by the United States Supreme Court, namely: pregnancy at time of trial adjudication is a constitutional requisite for standing and justiciability.

The final case cited on the point by the Supreme Court in *Roe v. Wade*, is *Truax v. Raich*, 239 U.S. 33, appears to be collaterally cited for its illustration of the approximity and facility of relief *pendente lite* to ensure the preservation of litigants' claimed constitutional rights until adjudication upon trial. Here, in this case, no temporary relief was prayed—no motion or other address to the trial court was made, because the actions of the respondent had rendered the matter hypothetical.

The pronouncements of the United States Supreme Court in *Roe v. Wade*, regarding the "Does" is contently equivalent to the here respondent's status than that of "Jane Roe." As is observed at "C" of the opinion (410 U.S. 127) "Mrs. Doe" who is not pregnant, and her husband asserted essentially the same claims as Jane Roe, but because of the wife's non-pregnant posture, relied upon present fear of future pregnancy without possibility of legal abortion as their basis for attack on the Texas

statutes. The Court determined they lacked standing saying (410 U.S. 128):

> But we are not prepared to say that the *bare allegation* of so indirect an injury is sufficient to present an actual case or controversy. (Emphasis added.)

Respondent, at best, upon trial, could only have proved the future possibility of pregnancy, and, except for the deception practiced by respondent in hiding her non-pregnant status, her allegation of pregnancy in this Complaint could have been stricken on motion. Moreover, such disparity between proof and pleading, obviates the latter averment as a significant legal declaration thereafter.

It would seem to necessarily follow that if the Court of Appeals' concept of standing were rationally applied, any individual woman, who was pregnant at any time (after *Roe v. Wade*) and claimed to have been illegally denied an abortion would be vested with standing regardless of her *non-pregnant* condition at the time of *filing*. Such an individual would have the same claim of "*injury*" as respondent here and could present at least an equivalent "status" as the respondent under the Court of Appeals' reasoning, and could just as fully benefit by a declaration of her Constitutional rights regarding an abortion even though it occurred before filing. Such a result is contrary to the unquestionable holdings in the cases cited by the Supreme Court in *Roe v. Wade*, supra, 410 U.S. 124, as authoritatively propounding the rule of lack of standing for non-pregnant litigants claiming Constitutional infringement of rights to abortion, and is hostile to the general requirements propounded requisite to Article III justiciability.

As a consequence of the force of the authorities, it appears that respondent's standing to litigate in the constitutional sense, was terminated when she, within five (5) days after filing suit and before trial, voluntarily caused her pregnancy to be aborted, and the Court of Appeals was without jurisdiction to do other than affirm the District Court.

CONCLUSION

Petitioners respectfully submit that the necessary legal effect of the Court of Appeals for the Eighth Circuit decisions here considered is to establish as a matter of Federal Constitutional absolute right of a woman to require a City to staff and equip its hospitals so as to accede to her demand for an abortion regardless of the fact that competent physicians determine that no medical reason exists for her abortion.

Further, the judicial conduct of the Court of Appeals employed in reaching its decisions were in violation of the operative rules for appellate courts and of the principles of fairness and the precepts of due process of law toward petitioners in adjudicating the case and in convicting and punishing by levying substantial penalties, and were arbitrary and in material abuse of lawful discretion.

Moreover, because of the absence of a Federal constitutional justiciable question, consequent upon the respondent's lack of standing and mootness of her claims, the Court of Appeals lacked jurisdiction to do other than to affirm the District Court in both appeals, and in failing this, acted contrary to Article III of the United States Constitution.

Therefore, we pray that because of the very important National effects of these decisions and the irregularity of the means employed by the Court of Appeals in reaching them, and the gross injustice to the petitioners they work, this Honorable Court ought to grant its writ of *certiorari* to review the case and declare the law.

Respectfully submitted

JACK L. KOEHR
City Counselor

EUGENE P. FREEMAN
Deputy City Counselor

Attorneys for Petitioners

APPENDIX

In the United States District Court
Eastern District of Missouri
Eastern Division

Jane Doe,
Plaintiff,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M. D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Defendants.
} No. 73 C 565 (A).

MEMORANDUM AND ORDER

(Filed March 22, 1974)

This matter is before the Court on the motion of the defendants, John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri, to dismiss the plaintiff's complaint for lack of standing. Defendants' motion is based on the defendants' allegation that the plaintiff has undergone an abortion operation subsequent to the filing of her complaint and is no longer pregnant and that, therefore, plaintiff has no personal standing to continue this action on behalf of herself or as a representative of a class.

Plaintiff, on her own behalf and on behalf of the entire class of women similarly situated,[1] filed this action on August 17, 1973, pursuant to 28 USC 1343, 2201 and 2202 and 42 USC 1983, asking for a declaratory judgment and permanent injunction against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general public hospitals of the City of St. Louis, Missouri, for the performance of abortions. Plaintiff contends that such express and implied policies, rules, regulations, procedures and practices are in violation of her constitutional rights and the constitutional rights of the class of women similarly situated, as protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

In her complaint plaintiff alleges that she is a resident and taxpayer of the City of St. Louis, and that during the month of August, 1973, on two separate occasions she requested an abortion at Starkloff Memorial Hospital, a public hospital run by the City of St. Louis. Plaintiff further alleges that physicians of the obstetrical staff at Starkloff Memorial Hospital refused to perform an abortion operation on her and that the refusals were based upon the blanket policy of the public hospitals of the City of St. Louis against performing abortions except when necessary to save the life of the mother. On both occasions when the public hospital staff physicians refused to abort the plaintiff, they advised her to seek an abortion elsewhere and then return to the public hospital for a hysterectomy operation, because she suffers from cervical,

[1] The class was defined in plaintiff's complaint as consisting of pregnant women who are residents of the City of St. Louis, Missouri, and who desire to utilize the personnel, facilities and services of public hospitals within the City of St. Louis, Missouri, for the medical termination of their pregnancy.

fibroid tumors and polyps, a retroverted uterus, and trichomycosis.

In defendants' motion to dismiss they state that they have reason to believe that plaintiff has had an abortion and is no longer pregnant, based upon information reported in the press, radio and television. Defendants argue that when the plaintiff aborted her pregnancy she lost her standing to bring this action on her own behalf or on the behalf of the class the plaintiff purports to represent. What defendants are really saying is that upon termination of her pregnancy before trial in the District Court, plaintiff's claim became moot and should be dismissed for lack of standing. The defendants are correct in their belief that the plaintiff is no longer pregnant. This Court was informed by letter dated February 22, 1974, from plaintiff's counsel (the first paragraph of which letter is attached hereto and marked Exhibit 1), that the plaintiff's pregnancy was terminated by an abortion operation on August 22, 1973, which was five days after the plaintiff filed this action and before the summons in this case was served on the defendant, R. Dean Wochner, M.D. (Served August 28, 1973).

This issue presented by defendants' motion to dismiss which must be decided is whether the plaintiff, who was pregnant and had standing on the date she filed her complaint and who terminated her pregnancy by undergoing an abortion operation five days thereafter, still has standing to proceed in this cause in her own behalf or on the behalf of the class she purports to represent.

This Court recognizes that the pregnancy which gave rise to the present controversy herein has been resolved by the plaintiff's termination of her pregnancy, but that the underlying problem of the blanket policy against abortions in the public hospitals of the City of St. Louis still remains. This allegedly unconstitutional policy continues to deny abortions to members of the class plaintiff purports to represent.

This Court will first resolve the issue of whether the plaintiff can still represent the class of pregnant women she purports to represent in her class action allegation. In a very straightforward statement, the Supreme Court in *Bailey v. Patterson*, 369 U. S. 31, 32-33, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962), while referring to a group of plaintiffs, said, "They cannot represent a class of whom they are not a part. *McCabe v. Atchison, T. & S.F.R. Co.*, 235 U. S. 151, 162-163."

There is no dispute as to the fact that the plaintiff's pregnancy was terminated by an abortion operation on August 22, 1973, and that she is no longer pregnant. Therefore, she is no longer a member of the class she purports to represent (see Footnote 1).

This Court finds that this action should not be maintained as a class action. The prayer of the complaint is for a declaratory judgment holding that the policies, rules and regulations of the St. Louis City Hospitals which restrict the performance of abortions are unconstitutional under the First, Fourth, Fifth and Ninth and Fourteenth Amendments. The prayer also seeks a permanent injunction restraining the defendants from enforcing said policies, rules and regulations. No damages are requested on behalf of the plaintiff or on behalf of the class. The determination of the constitutional question can be made by the Court and the policies, rules and regulations determined to be constitutional or unconstitutional, regardless of whether this action is treated as an individual action or as a class action. No useful purpose would be served by permitting this case to proceed as a class action. See *Ihrke v. Northern State Power Company*, 459 F. 2d 566, 572 (8th Cir. 1972).

This Court must resolve the question of whether the plaintiff who had standing on the date she filed her complaint and who terminated her pregnancy by an abortion operation six days thereafter, still has standing to proceed in this cause in her own behalf.

The plaintiff contends that the Supreme Court in *Roe v. Wade*, 410 U. S. 113, 124-125, 93 S. Ct. 705, 35 L. Ed. 147 (1973) unequivocably answered the above question of mootness in the negative and the question of standing in the affirmative. Plaintiff quotes from *Roe v. Wade*, supra, l.c. 124 and 125, as follows:

> "A. Jane Roe. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.
>
> "* * * * * * *
>
> "The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.
>
> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950); *Golden v. Zwickler*, supra; *SEC v. Medical Committee for Human Rights*, 404 U. S. 403 (1972).
>
> "But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will

be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 515 (1911). See *Moore v. Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll v. Princess Anne*, 393 U. S. 175, 178-179 (1968); *United States v. W. T. Grant Co.*, 345 U. S. 629, 632-633 (1953).

"We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot."

The plaintiff interprets the above quote from *Roe v. Wade*, supra, to mean that it is not necessary for the plaintiff to be pregnant at the time of trial to have standing and that termination of the plaintiff's pregnancy before trial does not render her claim moot. This Court does not agree with the plaintiff's interpretation. This Court calls attention to the only paragraph plaintiff omitted from the Supreme Court's discussion of standing and mootness in *Roe v. Wade*, supra, l.c. 124 and 125. This paragraph is of vital importance to the quote, and is as follows (l.c. 124):

"Viewing Roe's case as of the time of its filing and thereafter until as late as May" (the court is talking about May 21, 1970, the day before trial when plaintiff Roe filed an affidavit with the District Court) "there can be little dispute that it *then* presented a case or controversy and that, wholly apart from class aspects, *she, as a pregnant* single *woman* thwarted by Texas criminal abortion laws, had standing to challenge those statutes. *Abele v. Markle*, 452 F. 2d 1121, 1125 (CA2 1971); *Crossen v. Breckenridge*, 446 F. 2d 833, 838-839 (CA6 1971); *Poe v. Menghini*,

339 F. Supp. 986, 990-991 (Kan. 1972). See *Truax v. Raich*, 239 U. S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The 'logical nexus between the status asserted and the claim sought to be adjudicated,' *Flast v. Cohen*, 392 U. S. at 102, and the necessary degree of *conteniousness, Golden v. Zwickler*, 394 U. S. 103 (1969), are both present." (Emphasis added.)

Abele v. Markle, supra, cited in the omitted paragraph, is a case involving the constitutionality of an abortion statute, where the Court held that in order to demonstrate Federal standing to assert a personal claim the plaintiff had to allege and prove that she was pregnant. In the words of the Court in *Abele v. Markle*, supra, l.c. 1125:

"Accordingly we hold that nonpregnant female plaintiffs in this category do not show a sufficient nexus or present a sufficiently concrete issue in an adversary setting to give them standing, * * *."

In *Crossen v. Breckenridge*, supra, l.c. 829, the Court likewise reiterated the crucial element of "personal stake" in the outcome of the case and controversy, and held that where the woman was not pregnant, she had no standing. The same rationale is evident in *Poe v. Menghini*, see 339 F. Supp., l.c. 990.

In *Roe v. Wade*, supra, the Court at pp. 127-129, in discussing the standing of the Does, who were among the plaintiffs, held that where the wife was not pregnant at the time the cause was filed and based their claim on the fact Mrs. Doe might become pregnant, the District Court had appropriately dismissed their claim for lack of standing.

In *Golden v. Zwickler*, 394 U. S. 103, 108, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969) (relied on by the Supreme Court in *Roe v. Wade*, supra), the Supreme Court said:

"The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to that relief existed '[w]hen this action was initiated.' The proper inquiry was whether a 'controversy' requisite to relief under the Declaratory Judgment Act existed *at the time of the hearing* on remand. We now undertake that inquiry.

" '[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is as true of declaratory judgments as any other field.' *United Public Workers of America v. Mitchell*, 330 U. S. 75, 89 (1947). 'The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941)." (Emphasis added.)

The Court went on in *Golden v. Zwickler*, supra, l.c. 110, to say that constitutional questions must be presented to the courts in the context of a specific live grievance, and said:

> "No federal court, whether this Court or a district court, has 'jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies.' Liverpool, N.Y. & P.S.S. Co. v. Commissioners*, 113 U. S. 33, 39 (1885). (Emphasis added.) See also *United States v. Raines*, 362 U. S. 17, 21 (1960). The express limitation of the Declaratory Judgment Act to cases 'of actual controversy' is explicit recognition of this principle."

The application of the above cited cases to the instant fact situation brings this Court to the conclusion that the plaintiff herein does not have standing to proceed with her cause of action because she is no longer pregnant. The plaintiff's claim is no longer in the context of a specific live grievance as required by *Golden v. Zwickler*, supra.

The plaintiff cannot now nor at the time of this case would be heard show a substantial live controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. This is not to say that the issue the plaintiff brings to this Court is not justiciable but is only to say that plaintiff is not a proper party to request an adjudication. *Flast v. Cohen*, 392 U. S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968).

This Court finds not only that plaintiff lacks standing but that the termination of her pregnancy before even service was had on one of the defendants and before the trial, has rendered her claim moot. Plaintiff contends that the Supreme Court in *Roe v. Wade*, supra, l.c. 125, quoted above, is holding that termination of pregnancy before trial does not render a plaintiff's claim moot. This is not the case with respect to the trial court. In *Roe*, at page 125, the Supreme Court in discussing the question of "mootness" was referring to the "appellate process" rather than the trial status of a litigant. The Court there in effect held that where a plaintiff had standing at trial a change in her position after judgment (that is, abortion or coming to full term) should not deprive her of the right to the appellate process of our courts because "[i]t truly could be 'capable of repetition, yet evading review.' " *Roe v. Wade*, supra, l.c. 125.

There are many appellate decisions similar to the *Roe* case where situations are involved that made mootness inapplicable because to do so would prevent appellate courts passing on the question involved because of the time involved between the trial in the trial court and the consideration on appeal, but we are not dealing with that controversy at the trial level, and such rule has not been applied to the trial courts.

Accordingly, for the above reasons stated, the defendants' motion to dismiss for lack of standing is sustained.

/s/ Roy W. Harper
U. S. District Judge

Susman Willer & Rimmel
Attorneys at Law
705 Olive Street—Suite 1212
St. Louis, Mo. 63101

February 25, 1974

The Honorable Roy W. Harper
United States District Judge
United States Court and Customs House
1114 Market Street
St. Louis, Mo. 63101

Re: *Doe v. Poelker, et al.*,
Cause No. 73C 565(A)

Dear Judge Harper:

This letter shall serve to provide the Court with firm authority as to a continuing, justiciable controversy, despite the termination of plaintiff's pregnancy on or about August 22, 1973 and for the authority as to the proper party defendants.

United States Court of Appeals
For the Eighth Circuit

No. 74-1232

Jane Doe,
Appellant,
v.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: May 17, 1974

Filed: June 4, 1974

Before Bright and Ross, Circuit Judges, and Talbot Smith, Senior District Judge.*

Ross, Circuit Judge.

This is an action for a declaratory judgment and a permanent injunction against implementation of the policies, rules, regulations and procedures barring the performance of abortions in the two public hospitals in the City of St. Louis, Missouri. From an order dismissing the complaint for lack of standing and mootness, Doe appeals. For the reasons hereinafter expressed, we reverse.

---

* Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

Jane Doe alleged in her complaint, and verified by way of affidavit, that she was pregnant, was the mother of two children, was in severe financial straits, and was suffering from cervical fibroid tumors and polyps, a retroverted uterus, and trichomycosis. Twice she consulted staff members at Starkloff Memorial Hospital, owned and operated by the City of St. Louis, and was advised that she would require a hysterectomy. They told her to procure an abortion elsewhere and then return to the hospital for the hysterectomy. The reasons proffered by the hospital for the two-operation recommendation was the hospital's stated policy[1] against performing abortions. Doe thereupon commenced this action against the Mayor of St. Louis and the Director of the Department of Health and Hospitals on her own behalf and on behalf of the entire class of pregnant women residents of the City of St. Louis, Missouri, desiring to utilize the personnel, facilities and services of the general public hospitals within the City of St. Louis for the termination of pregnancies.

After the complaint had been filed and service perfected upon one of the defendants, but before service on the other defendant, Doe procured an abortion from an alternative source.[2]

---

[1] That policy is expressed in the defendants' joint answer:

> 10. Abortion, for reasons other than to save the mother from grave physiological injury or death, is against and contrary to the laws and public policy of the State and City.
>
> * * * * * * *
>
> 12. [A]bortion, other than to protect the mother from grave physiological injury or death, is a medical procedure which lawfully can and has been reasonably excluded from such services given by the City's hospitals.

[2] This fact was verified to the court by Doe's counsel. Throughout the litigation her counsel has sought to protect Doe's true identity in order to avoid harassment. However, counsel has assured the court that Doe remained ready and able for deposition or other discovery procedures. Counsel's assurances and the fact that Doe herself, under her pseudonym signature, has filed an affidavit affirming the veracity of the relevant facts, permits us to accept as true, her existence and her pregnant state at the commencement of this action. *See Roe v. Wade*, 410 U.S. 113, 124 (1973); *Doe v. Bolton*, 410 U.S. 179, 187 (1973).

Defendants thereafter moved the court to dismiss Doe's complaint for lack of standing.[3] In granting defendants' motion, the court held that, by virtue of the fact that Doe had obtained an abortion, Doe was no longer a member of the class she purported to represent. The court then ordered that Doe could not represent the class of pregnant female residents of St. Louis. Next, the court determined that although she may have had standing to proceed on her own behalf on the date she filed her complaint, her individual case had become moot after she procured an abortion. *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), compel a different result on both standing and mootness.

The question of standing in the federal court is to be considered in the framework of Article III which restricts the judicial power to "cases" and "controversies." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970). In terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. *Flast v. Cohen*, 392 U.S. 83, 101 (1968). The prerequisites of standing are a "logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen, supra*, 392 U.S. at 102, and the necessary degree of contentiousness, *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

These requirements are met on these facts. Plaintiff's injury and that of her class is her inability to obtain an abortion prior to fetal viability in St. Lous public hospitals free from regulations other than those that advance interests in maternal health. The interest sought to be protected is the constitutionally guaranteed right to an abortion prior to viability. The defendants

---

[3] This motion was brought six months after the filing of the complaint and presumably upon defendants' first notice that Doe had obtained an abortion.

are attempting to regulate that interest by the challenged rules and policies of the hospital which inhibit and (in effect) proscribe abortions.

This conclusion that Doe has standing is mandated by the resolution of the identical issue in *Roe v. Wade, supra,* 410 U.S. at 124, and *Doe v. Bolton, supra,* 410 U.S. at 187. Each of the plaintiffs in those actions was, like the plaintiff here, not shown to have been pregnant at the time of the district court hearing. Likewise, each of the plaintiffs was, at the relevant time, precluded from implementing her previability abortion decision by the challenged statutes and regulations. In *Roe,* the Supreme Court said:

> Viewing Roe's case as of the time of its filing and thereafter until as late as May [yet prior to the May 22 district court hearing], there can be little dispute that it *then* presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. . . . The "logical nexus between the status asserted and the claim sought to be adjudicated," and the necessary degree of contentiousness are both present.

Id. at 124 (emphasis supplied and citations omitted). The court thereupon found that Roe had standing to undertake the litigation. *Id.* at 125. A similar result was reached in *Doe v. Bolton* where it was concluded that Doe's pregnant state on the date of the commencement of the action gave her standing to maintain the action. *Id.* at 187. Recently, in *Doe v. Israel,* 482 F.2d 156, 158 (1st Cir. 1973), *cert. denied,* 42 U.S.L.W. 3627 (May 13, 1974), the First Circuit has said:

> In response to questioning defendant essentially suggests only one: that plaintiffs, no longer being pregnant, have no sufficient interest or standing. In the light of *Roe,* this argument proves too much.

> We consider that defendant's claim of mootness is a will-o'-the-wisp and assumes the very question at issue. If a plaintiff has a right to terminate her pregnancy—which is the legal question before us—the sooner she succeeds in doing so, the better. We have in mind the trimester trilogy, on which defendant relies in another connection, and its effect on viability and the pregnant plaintiff's health. It seems not only illogical but, to use a polite word, harsh, to argue that in order to establish her right to an abortion a woman must decline to have it. (Citation omitted.)

We conclude here that Doe has standing to challenge the hospital policy. Moreover, since she has adequate standing to proceed in her own behalf, on the authority of *Doe v. Bolton, supra,* 410 U.S. at 188, Doe and her class can be recognized.

Separate and distinct from standing is the doctrine of mootness. That question is also a product of the Article III requirement of a case of controversy. *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). The usual rule in federal cases is that an actual controversy must exist at all stages of appellate or certiorari review, and not simply at the date the action is initiated. *SEC v. Medical Committee for Human Rights,* 404 U.S. 403, 406 (1972); *Golden v. Zwickler, supra,* 394 U.S. at 108; *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39 (1950). However, a case presenting a question that is "capable of repetition, yet evading review," is nevertheless amenable to federal adjudication even though it might otherwise be considered moot. *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911). As is clear from the Supreme Court's treatment in *Roe* and *Doe,* pregnancy is one of the exceptional situations exempted from the usual rule.

In *Roe,* the Court said:

> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is

> so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review."

Id. at 125 (citations omitted). The Court accepted as true Roe's pregnant state as of the inception of her suit. The Court did not find, however, that Roe was likewise pregnant at the time of the trial court's hearing on May 22, 1970. Yet, based upon the foregoing reasoning, the Court held that she presented a justiciable controversy and "the termination of her 1970 pregnancy ha[d] not rendered her case moot." *Id.* at 125. Likewise in *Doe v. Bolton, supra,* 410 U.S. at 187, the Court accepted the plaintiff's pregnant state on the date of the filing of the complaint and thereupon held, on the basis of the decision in *Roe,* that the interim termination of her pregnancy had not rendered the case moot. To interpret the Supreme Court's discussion of mootness, as the district court did here, to require pregnancy to be established at the time of trial, would be to permit frustration of the logic announced by the Supreme Court. Through dilatory tactics opposing counsel could effectively preclude review of the challenge until abortion or birth terminated the pregnancy. Crowded dockets could cause the same unfortunate result. Accordingly, we find that the plaintiff Jane Doe in this case presents a justiciable controversy and the termination of her pregnancy sometime after the filing of the complaint, but prior to trial, does not render her case moot.

For the reasons hereinbefore expressed, we reverse and remand to the district court for further proceedings consistent

with the views expressed in this opinion and in our opinion in *Nyberg v. City of Virginia,* No. 73-1686 (8th Cir. Feb. 19, 1974).

A true copy.

Attest: ROBERT C. TUCKER

Clerk, U. S. Court of Appeals, Eighth Circuit

(Seal)

United States Court of Appeals
For the Eighth Circuit

74-1232 September Term, 1973

Jane Doe, Appellant,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

(Filed June 27, 1974)

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

June 27, 1974

A True Copy.

Attest: ROBERT C. TUCKER

Clerk, U. S. Court of Appeals, 8th Circuit

(Seal)

In the United States District Court
Eastern District of Missouri
Eastern Division

Jane Doe, Plaintiff,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M. D., Director of the Department of Health and Hospitals and acting Hospital Commissioner of the City of St. Louis, Missouri, Defendants.

No. 73C 565 (A)

MEMORANDUM AND ORDER

(Filed January 13, 1975)

This is an action by plaintiff seeking to have declared as unconstitutional those rules and regulations of the public hospitals of the City of St. Louis, Missouri, which prohibit utilization of city hospital facilities and personnel for the performance of abortions except for medical reasons.

Plaintiff, suing under the pseudonym of Jane Doe, is a married woman who was pregnant at the time of the filing of the complaint. Defendants are John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, Director of Health and Hospitals for the City of St. Louis.

Plaintiff brings this cause of action on her own behalf and on behalf of the entire class of women who reside in St. Louis

and desire to utilize the services of the St. Louis public hospitals in order to obtain abortions. Jurisdiction of this Court is invoked pursuant to 28 USC 1343, 2201 and 2202, and 42 USC 1983. Plaintiff contends that on two separate occasions during August of 1973 she sought an abortion at Starkloff Memorial Hospital, a public hospital run by the City of St. Louis, but was refused based upon the hospital's policy against performing non-therapeutic abortions. Such policy is alleged to be violative of various constitutional rights, including the right to privacy within the patient-physician relationship; the right to obtain medical services; the right to determine whether to bear children and maintain marital privacy; the right to receive adequate medical advice pertaining to pregnancy; and the right to equal protection and due process of law. Plaintiff seeks a judgment declaring invalid all policies and regulations of the St. Louis public hospitals which restrict the use of their personnel, services and facilities for the performance of non-therapeutic abortions, and requests that defendants be permanently enjoined from enforcing such policies.

St. Louis operates two general public hospitals, Max C. Starkloff Hospital and Homer G. Phillips Hospital, designated City Hospital Numbers 1 and 2, respectively. The policy regarding performance of abortions in the city hospitals in embodied in the hospital by-laws, which provide that abortions shall be performed only for "medical reasons" (Defendants' Answer to Plaintiff's Interrogatory No. 1). This policy was in effect at both St. Louis public hospitals at all times relevant to this lawsuit, and remains in effect today.

At trial plaintiff testified that she has two children and has miscarried five times since being married in 1965. In 1973 her husband was arrested for a felony and faced with possible imprisonment. In July, 1973, plaintiff missed her menstrual period and on August 7th she went to the gynecology clinic at St. Louis City Hospital Number 1 to determine if she was

pregnant. At the clinic she was examined by a third-year medical student assigned to the hospital. Plaintiff testified that she inquired about abortion services at that time, although the student who examined her had no recollection of such a conversation. That examination disclosed no medical justification for an abortion.

On August 13th, plaintiff returned to the gynecology clinic for the results of her laboratory test. Upon being told she was pregnant she requested that the hospital perform an abortion. The medical student who examined her on this occasion testified that he found nothing to indicate that an abortion should be performed. He stated at trial that he was not aware of the city's policy against abortions, but told plaintiff that he did not know of anyone at the hospital to refer her to that was not opposed to abortion for moral reasons. However, he made an appointment for her to visit the obstetrics clinic the next day.

On August 14, 1973, plaintiff was interviewed by Dr. William J. Ott at the Starkloff Hospital (City Hospital Number 1) obstetrics clinic, who told her that her medical condition did not indicate that an abortion was necessary, and that his personal beliefs precluded him from performing abortions. Plaintiff was examined the same day and again on August 15th by Dr. Ziad Abu Dalu, who confirmed that there were no medical reasons to justify termination of her pregnancy and that the hospital could not comply with her request for an abortion. Although Dr. Dalu did not discuss his personal beliefs with plaintiff at that time, the record discloses that as a member of the Moslem faith Dr. Dald would refuse to participate in an abortion.

The instant suit was filed August 17, 1973. Subsequently, on August 22nd, plaintiff procured an abortion at a private St. Louis abortion clinic.

Plaintiff now contends that the above policy of the St. Louis City public hospitals contravenes certain recent court decisions which deal with the constitutionality of abortion regulation. Defendants maintain that such a policy is in violation of neither express nor judicially established constitutional principles. In addition, defendants state that continued enforcement of this policy has since 1973 been supported by Missouri statute, to wit, RSMo 197.032, which was passed in that year and which provides in part:

> "1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of such refusal to treat or admit for treatment any woman for abortion purposes."

Plaintiff does not seek to challenge RSMo 197.032 in this proceeding.

Plaintiff has cited to this Court the recent companion Supreme Court case of *Roe v. Wade*, 410 U. S. 113 (1973), and *Doe v. Bolton*, 410 U. S. 179 (1973), which established the principle that a woman has a qualified right to obtain an abortion, which may override the state's interest in restricting her decision during early stages of pregnancy. The Court's attention is also directed to the subsequent Eighth Circuit Decision of *Nyberg v. City of Virginia*, 495 F. 2d 1342 (1974). In that case the Court was presented with a request from two duly licensed physicians that they be permitted to use the facilities of the public municipal hospital at Virginia, Minnesota, in

order to perform abortions on their patients who desired such services. Although plaintiffs were members of the hospital staff, they were precluded from performing abortions there by a hospital resolution similar to that in effect at the St. Louis City public hospitals.

In *Nyberg* the Eighth Circuit Court of Appeals first stated that the abortion procedure was no more complicated than other surgical procedures which the plaintiff-physicians were permitted to perform at the hospital. In ruling in favor of the doctors, the Court went on to say at page 1346:

> "It would be a nonsequitur to say that the abortion decision and its effectuation is an election to be made by the physician and his patient without interference by the state and then allow the state, through its public hospitals, to effectively bar the physician from using state facilities to perform the operation."

Plaintiff now claims that under the authority of these decisions, a public hospital must be required to provide facilities and personnel to any woman requesting that such hospital perform an abortion on her. This Court does not believe that the above cases were intended to establish such a broad proposition as that now urged by plaintiff.

In *Doe v. Bolton*, supra, the Supreme Court invalidated certain portions of Chapter 26-12 of the Georgia Criminal Code on grounds that it was over-restrictive of the circumstances under which a physician could perform an abortion. However, the Court explained at page 189 that:

> "Roe v. Wade, supra, sets forth our conclusion that a pregnant woman does *not* have an absolute constitutional right to an abortion on her *demand*." (Emphasis added.)

Furthermore, in *Doe* the Court let stand section 26-1202(e) of the Georgia statute which provided as follows:

"Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b)(5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person."

With regard to this provision, which is very similar to RSMo 197.032, the Supreme Court stated at pages 197-198 of its opinion:

> "Under § 26-1202(e), the hospital is free *not to admit* a patient for an abortion. * * * Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. * * * § 26-1202(e) affords adequate protection to the hospital * * *." (Emphasis added.)

It is, therefore, axiomatic that no physician or other hospital employee may be compelled to perform an abortion in violation of his personal beliefs. *Nyberg* merely held that where a physician on the staff of a public hospital desired to perform a non-therapeutic abortion, the state could not place an absolute bar on that decision. The Court concluded at page 1347 of that opinion:

> "[W]hile we propose to fashion no specific procedures which must be followed *nor to require any individual staff members to participate in* abortion procedures, we do so hold that the hospital facilities must be made available for abortion services, as they are for other medical procedures, *to those physicians* and their patients who have a right to and *request* such facilities." (Emphasis added.)

A careful reading of the *Nyberg* decision discloses that it falls far short of holding that a hospital, albeit open to the public, must be forced to furnish physicians for women desiring to obtain abortions. The Court was careful to point out that:

> "Contrary to the view taken by appellant, Roe and Doe do not suggest *and no hospital need provide* facilities for an abortion merely upon a mother's demand." (Emphasis added.) 495 F. 2d at page 1346, footnote 5.

In the instant case this Court is not presented with a request from any physician desirous of using the St. Louis City hospital facilities in order to perform an abortion upon his patient. Nor is there anything in the record to show that there is any physician presently on the staff of either public hospital in St. Louis who is willing to admit the plaintiff as his patient for such a purpose. To the contrary, all of the medical personnel who examined plaintiff at Starkloff Hospital stated emphatically that they hold strong personal beliefs against abortion, and at one point plaintiff was told that there was no one to refer her to who was willing to perform such a procedure in the absence of any medical justification.

In effect, plaintiff is asking this Court to hold that the City of St. Louis must provide someone to take care of any woman who requests an abortion at one of its hospitals. Such a holding would be clearly contrary to established constitutional principles, and this Court will issue no order designed to have such an effect.

This memorandum opinion is adopted by the court as its findings of fact and conclusions of law, and the clerk of the Court is directed to prepare and enter the proper order finding for the defendants.

/s/ ROY W. HARPER
U. S. District Judge

United States Court of Appeals
for the Eighth Circuit
St. Louis, Mo. 63101

April 14, 1975

Robert C. Tucker, Clerk
Mr. Jack L. Koehr
City Counselor
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103

Re: No. 75-1069. Doe v. Poelker.

Dear Sir:

Enclosed herewith, for use of counsel, printed copy of the opinion of this Court filed today in the above case. Judgment of this Court in accordance with the opinion is also entered today.

Very truly yours

/s/ ROBERT C. TUCKER
Clerk

enc.

United States Court of Appeals for the Eighth Circuit

No. 75-1069

Jane Doe, et al., Appellants,

v.

John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

---

Submitted: March 14, 1975

Filed: April 14, 1975

Before Van Oosterhout, Senior Circuit Judge, Ross, Circuit Judge, and Talbot Smith, Senior District Judge.*

Ross, Circuit Judge.

Jane Doe,[1] a pregnant resident of St. Louis, Missouri, at the

---

* Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

[1] "Jane Doe" is a pseudonym for the actual plaintiff. It has been utilized throughout this litigation to protect her true identity in order to avoid harassment due to the controversial nature of the subject matter of this action.

time the lawsuit was filed, brought this civil rights class action under 42 U.S.C. § 1983 against John H. Poelker, the Mayor of St. Louis, and Dr. R. Dean Wochner, the Director of the Department of Health and Hospitals and Acting Hospital Commissioner of St. Louis [hereinafter referred to collectively as "the city"] seeking, in her broadly worded complaint, declaratory and injunctive relief

> against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri . . . for the performance of abortions.

The jurisdiction of the federal court was based on 28 U.S.C. § 1343.

On March 22, 1974, the district court[2] sustained a motion by the city and dismissed the complaint for lack of standing and mootness. On appeal this Court reversed and remanded for further proceedings. *Doe v. Poelker*, 497 F.2d 1063, 1067 (8th Cir. 1974).

Accordingly, a trial to the court was held on November 25, 1974, and on January 13, 1975, the court issued a memorandum and order finding for the city and dismissing the complaint with prejudice. The trial judge appears to have agreed with Doe that there is a city policy prohibiting abortions, but he never considered the constitutionality of such a policy because he felt that Doe had failed to establish that the policy had been applied to her. Instead, it was his opinion that Doe had merely been refused an abortion by certain physicians at the

---

[2] The Honorable Roy W. Harper, Senior United States District Judge, Eastern District of Missouri.

city hospital's obstetrics-gynecology clinic because of their own personal moral and ethical beliefs on that subject. We reverse.

The incidents giving rise to this litigation occurred during August, 1973. Doe, the mother of two who was in severe financial straits and who had reason to fear that her husband might be sent to prison, suspected she might be pregnant. She had had five prior miscarriages. She went to the gynecology clinic at Max C. Starkloff Hospital, owned and operated by the city, and was examined by a third-year medical student assigned to the hospital. Although the student did not recall the conversation, Doe testified that she asked him at that time if she could obtain an abortion at the city hospital and that he had responded that it could not be done because it was against hospital policy. Doe returned to the clinic six days later for the results of the laboratory pregnancy test, and when informed by another medical student who was examining her that the results was positive she requested an abortion at the hospital. The student indicated that he had personal convictions against abortions and that he knew of no one at the city hospital to whom to refer Doe. However, an appointment was made for the next day at the obstetrics clinic.

At that clinic Doe was seen by Dr. William J. Ott, at that time the chief resident from St. Louis University in the obstetrical service at the city hospital. She told Dr. Ott that she desired an abortion. Dr. Ott, having strong personal beliefs on the subject, refused to consider it and refused to give her even a written statement as to her state of pregnancy. Instead he referred her to another physician at the clinic, Dr. Ziad Abu Dalu, who saw her that same day and the next. Both times Doe requested an abortion at city hospital and Dr. Abu Dalu refused, telling her "that we couldn't do one at City Hospital." Dr. Abu Dalu does have personal convictions against abortions, but did not elaborate them to Doe. Subsequent to the filing of this lawsuit, Doe was aborted at a private clinic in St. Louis.

While the students and doctors who saw Doe at the clinic were aware of her personal family and financial problems none of them found any "medical reasons" to justify an abortion, defining such reasons as severe sickness of the patient such as "severe diabetes," "severe heart condition" or "something of that type." Doe was suffering from cervical fibroid tumors and polyps, an extremely retroverted uterus and trichomycosis.

The district court impliedly found, and there can be no doubt, that there is an official St. Louis city policy promulgated by the mayor prohibiting the performance of abortions in the city-owned public hospitals for reasons other than to save the mother from grave physiological injury or death. The city admitted as much in its answer to the complaint, and the mayor himself testified that, upon taking office in the spring of 1973, he directed that the existing policy be continued, understanding that it allowed abortions only if the life of the mother was in danger.[3] Additionally, Dr. Wochner stated that such a policy had been given to him by the mayor to carry out.

In addition to the policy, the evidence reveals that there is a "procedure and practice" which operates to bar the performance of abortions at the city's hospitals—the method of staffing the obstetrics-gynecology clinic.[4] The clinic, which is provided by

[3] It is noteworthy that this specific directive was promulgated by Mayor Poelker several months *after* the Supreme Court's abortion decisions were announced on January 22, 1973. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

[4] From exchanges which occurred during the trial it appears that the district judge thought the complaint was not broad enough to cover an attack on the staffing of the OB-GYN clinic. We disagree. The complaint specifically mentions "procedures and practices" which thwart the performances of abortions as being under attack. The manner of staffing a hospital is certainly a "procedure and practice" of that hospital. And, of course, any complaint must be read in the light of Fed. R. Civ. P. 8(f), which states that "[a]ll pleadings shall be so construed as to do substantial justice."

The city can hardly complain that it was surprised by the staffing issue in view of the broad wording of the complaint. It certainly knew that the gravamen was an attack on everything the city did which had the effect of keeping abortions from being performed in its hospitals. And when Doe put on evidence relating to staffing, the city did not ask for a continuance or attempt to offer any contrary evidence of its own.

the city, at least in part, to care for indigent patients, is staffed entirely by faculty and students from the St. Louis University School of Medicine. That university is a Catholic, Jesuit-operated institution, and its faculty manual calls for the discharge of any faculty member who engages in "[a]ll grave offense in the discharge of University responsibilities, which is clearly against well-established principles of Catholic morality." One witness, a Jesuit professor at the university, testified that the performance of an abortion by a faculty member would be a "gravely immoral [act] by the Catholic standards." As such, of course, it would subject him to discharge.

Dr. Frank Ostapowicz, a professor at the School of Medicine and Chief of Gynecological and Obstetrical services at the city hospital testified by affidavit that he had told the city's Director of Health and Hospitals (Dr. Wochner) that

> neither I, those under my direction and supervision, or St. Louis University Medical School with which we were (and are) all associated, would participate in providing abortion services to women who did not have true medically grave reasons which furnished professionally ethical and moral justification for such procedure.

The result of this staffing exclusively from St. Louis University, together with the official policy of the city, is that indigent pregnant women who desire abortions are unable to find a physician at the city OB-GYN clinic who will perform one.[5]

[5] The city operates two general hospitals, Max C. Starkloff Hospital and Homer G. Phillips Hospital. The OB-GYN clinic to which Doe went was at Starkloff, and it is staffed as described in the text. There is some indication in the record that there is also an OB-GYN clinic at Phillips. There is no evidence regarding its staffing. How-

The official city policy and the "staffing procedure" were applied to Doe and the other members of her class and successfully prevented them from utilizing the city's hospitals to obtain abortions. Dr. Wochner testified that had it not been for the policy promulgated by the mayor he would have proceeded to implement the providing of abortions at the city's public hospitals. This evidence strongly suggests that had the policy not been extant, Doe could have obtained an abortion at the city hospital. Additionally, there is evidence that Doe was specifically told that she could not have an abortion at the city hospital, again indicating that it was the city policy which prevented the use of these facilities for that purpose. Likewise, it is clear that the staffing procedure effectively foreclosed any possibility that any pregnant women could ever find a staff physician who would agree to perform an abortion in the city hospital unless her life or health was in severe danger. The conclusion that Doe was not affected by the policy and the staffing procedure simply cannot stand in light of this evidence and the salient fact that, despite a number of requests, not a single abortion has been performed in the St. Louis public hospitals since before the Supreme Court's abortion decisions in January, 1973, to date.

The district court reasoned and the city contends on appeal that no woman has an absolute constitutional right to an abortion on demand and that, therefore, Doe has no right to demand that the clinic doctors at city hospital perform an abortion on her. Regardless of the merits of this argument, we think it misses completely the point of this litigation. Doe does not "demand" an abortion; but, rather, she asks that the city not

---

ever, the evidence strongly indicates that Doe could not have received an abortion at Phillips. No abortions had been performed at either hospital since January, 1973. And when Doe told the physicians at the clinic that she desired an abortion they referred her to Planned Parenthood or to the counselors at Starkloff, *not* to the clinic at Phillips.

deny her equal protection of the law by interfering in her decision of whether to bear a child or have an abortion simply because she is indigent and unable to afford private treatment. Stripped of all rhetoric, the city here, through its policy and staffing procedure, is simply telling indigent women, like Doe, that if they choose to carry their pregnancies to term, the city will provide physicians and medical facilities for full maternity care; but if they choose to exercise their constitutionally protected right to determine that they wish to terminate the pregnancy, the city will not provide physicians and facilities for the abortion procedure, even though it is probably safer than going through a full pregnancy and childbirth. *Roe v. Wade*, 410 U.S. 113, 163 (1973). No rational or legally cognizable basis for this distinction is offered.[6] And it is certainly true that this distinctive treatment represents as much interference in the abortion decision of an indigent woman by the city as the prohibition of all nontherapeutic abortions in city-operated hospitals condemned by this Court in *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir.), *appeal dismissed*, 95 S.Ct. 169 (1974).

Such arbitrary governmental discrimination against indigent women choosing to have an abortion has been roundly denounced by the courts. *Wulff v. Singleton*, 508 F.2d 1211, 1215-1216 (8th Cir. 1974); *Doe v. Rose*, 499 F.2d 1112, 1115-1117 (10th Cir. 1974); *Doe v. Rampton*, 366 F.Supp. 89, 193 (D. Utah 1973) (3-judge court); *Klein v. Nassau County Medical Center*, 347 F.Supp. 496, 500-501 (E.D. N.Y. 1972) (3-judge court), *vacated and remanded for further consideration in light of Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), 412 U.S. 925-926

---

[6] The city had conducted no cost estimates or any other serious studies to see whether or not it was fiscally feasible to perform abortions in city hospitals. Dr. Wochner did testify that he thought it would generally be less expensive to perform an abortion than to deliver a baby. The only reason advanced by the mayor for his policy was his own personal conviction that abortion was tantamount to murder.

(1973). In the recent decision in *Wulff v. Singleton, supra,* 508 F.2d at 1215, the State of Missouri had by statute prohibited medicaid payments to women receiving welfare benefits who had undergone nontherapeutic abortions while, at the same time, providing such payments to women welfare recipients who carried their pregnancies to term. This Court stated: "This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment." There is no practical distinction between that case and this one.

* * * * * * *

The three-judge district court in *Klein v. Nassau County Medical Center, supra,* 347 F.Supp. at 500, gave the rationale underlying its decision that the equal protection clause prohibited New York State from providing medical assistance to indigent mothers who carried their pregnancies to term but not to those who choose to have nontherapeutic abortions in language which we find equally compelling in the circumstances of the instant case.

> The directive [prohibiting medical assistance to indigent women having nontherapeutic abortions] . . . den[ies] indigent women the equal protection of the laws to which they are constitutionally entitled. They alone are subjected to State coercion to bear children which they do not wish to bear, and no other women similarly situated are so coerced. Other women, able to afford the medical cost of either a justifiable abortional act or full term child birth, have complete freedom to make the choice in the light of the manifold of considerations directly relevant to the problem uninhibited by any State action. The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child. She is denied the medical assistance that is in general her statutory entitlement, and that is otherwise extended to her even with respect to her pregnancy. She is thus discriminated against both by reason of her poverty and by reason of her behavioral choice.

We conclude that the city policy against all nontherapeutic abortions together with the staffing procedures at the OB-GYN clinic of the city hospital combine to deny Doe and her class the equal protection of the law.[7]

Remedy

We declare the city's policy prohibiting all nontherapeutic abortions in its publicly owned hospitals to be unconstitutional as an unwarranted infringement on pregnant women's right to privacy and as a denial of equal protection to indigent pregnant women. Likewise, we declare the method of staffing the obstetrics-gynecology clinic of the city hospitals to be an unconstitutional denial of equal protection to those indigent pregnant

---

[7] The city urges as a defense that its policy and staffing were authorized by Mo. Rev. Stat. § 197.032 (Supp. 1975), which provides:

> No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital.

Doe does not attack this statute in the instant litigation. Nonetheless, there is no merit to the city's argument. The city's policies and acts must be judged against the federal Constitution in this action under 42 U.S.C. § 1983. The very purpose of section 1983 would be completely obliterated if local officials were to have their actions judged only in the light of state law and not under constitutional standards.

It may appear to follow logically from our holding in this case that the Missouri statute is unconstitutional. However, that question is not before us, and we do not decide it. We simply review the city's policy and procedures under established constitutional principles and find them lacking.

women who, in exercising their right to privacy, may choose to terminate the pregnancy under the guidelines laid down by *Roe v. Wade, supra,* and *Doe v. Bolton,* 410 U.S. 179 (1973). We hold that both city owned hospital facilities must be made available for abortion services as they are other medical procedures. *Nyberg v. City of Virginia, supra,* 495 F.2d at 1347.

We remand the cause to the district court for the fashioning of prompt and appropriate injunctive relief. In addition to enjoining enforcement of the city's antiabortion hospital policy, this relief should, at a minimum, impose upon the city the duty to obtain the services of responsible physicians and other necessary personnel whose personal views on abortion do not prohibit them from providing an abortion. It must also provide the necessary equipment and facilities to accomplish the goal. In short, the city will not be allowed to achive indirectly through its manner of staffing its hospitals what it cannot accomplish directly—the prohibition of all nontherapeutic abortions in those hospitals. As stated by the Supreme Court in the context of school desegregation:

> [C]onstitutional rights . . . not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted "ingeniously or ingenuously."

Cooper v. Aaron, 358 U.S. 1, 17 (1958).

We stress, however, that the remedy is to be directed at the city officials acting as such and should order them to take certain official actions. It should not require that any present member of the staff of the public hospitals or any individual employee of the hospitals participate or assist in any way in the performance of abortions if, as a matter of conscience, he objects to so doing. *See Doe v. Hale Hospital,* 500 F.2d 144, 147 (1st Cir. 1974), *cert. denied,* 43 U.S.L.W. 3416 (U.S. Jan. 28, 1975); *Nyberg v. City of Virginia, supra,* 495 F.2d at 1347.

Attorneys' Fees

On appeal Doe asked that she be awarded attorneys' fees as costs. The traditional American rule ordinarily disfavors allowance of attorneys' fees to the prevailing party. It is clear, however, that the federal courts do have equitable power to award such fees when, in the interests of justice, the situation calls for them to do so. *Hall v. Cole,* 412 U.S. 1, 4-5 (1973); *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166 (1939).

One such recognized exception to the rule is found where a party has acted as a "private attorney general" in vindicating an important public policy. *Hall v. Cole, supra,* 412 U.S. at 6 n.7; *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968); *Fowler v. Schwarzwalder,* 498 F.2d 143, 145-146 (8th Cir. 1974). We are convinced that this case falls within this exception. City authorities were acting in such a way as to deny a large number of women their constitutional right to privacy in making the abortion decision free from state interference or coercion, a right which had been clearly enunciated by the Supreme Court in *Roe v. Wade, supra,* 410 U.S. at 153, 164. Doe brought this action under 42 U.S.C. § 1983, a statute which evinces strong national policy in favor of protecting individuals' federal constitutional rights from abridgement by state authorities. In vindicating her constitutional right to privacy and equal protection in the abortion decision Doe thus enforced the important public policy of insuring that federal constitutional guarantees are not trampled upon under the guise of state or local law. *See Taylor v. Perini,* 503 F.2d 899, 905 (6th Cir. 1974); *Hoitt v. Vitek,* 495 F.2d 219, 221 (1st Cir. 1974); *Brandenburger v. Thompson,* 494 F.2d 885, 888-889 (9th Cir. 1974).[8]

---

[8] Doe suggests that awarding attorneys' fees would be proper here under another exception to the rule—where a party has acted in bad

Accordingly, we award Doe attorneys' fees for the appellate portion of this litigation in the sum of $3,500 against the defendant Poelker.[9] On remand the district court is directed to determine attorneys' fees and to award them to Doe, together with court costs, against the defendant Poelker for that portion of this case carried on in that court. This should be a fair award based on the guidelines listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

Conclusion

For the reasons discussed in this opinion the judgment of the district court is reversed and the case is remanded for the prompt fashioning of injunctive relief and for awarding attorneys' fees to the appellant Doe for services in the district court.

A True Copy.

Attest: /s/ ROBERT C. TUCKER

(Seal) Clerk, U.S. Court of Appeals, 8th Circuit.

---

faith, vexatiously, wantonly or for oppressive reasons. *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.4 (1968); *Fowler v. Schwarzwalder*, 498 F.2d 143, 144 (8th Cir. 1974); *Bell v. School Board*, 321 F.2d 494, 500 (4th Cir. 1963). The long history of abortion litigation involving the State of Missouri and the City of St. Louis certainly suggests that these governments have delayed complying with the clear dictates of the Supreme Court and this Court to the maximum extent and have obstinately continued to implement and enforce statutes, regulations and policies designed to circumvent the constitutional law declared by the Supreme Court. *See Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974); *Doe v. Poelker*, 497 F.2d 1063 (8th Cir. 1974); *Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974). However, in light of our determination that attorneys' fees are to be awarded under the "private attorney general" theory, we need not and do not decide whether or not the actions of the city underlying this litigation and during the course of it call for application of this second exception.

[9] The evidence reveals that defendant Wochner was an appointee of the mayor and that he was simply carrying out his superior's orders in implementing the city policy. Therefore, we do not feel that attorneys' fees should be awarded against him.

United States Court of Appeals
for the Eighth Circuit
St. Louis, Mo. 63101

May 7, 1975

Robert C. Tucker, Clerk
Mr. Jack L. Koehr
City Counselor
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103

Mr. Frank Susman
Susman, Schermer, Willer & Rimmel
7733 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105

Re: No. 75-1069. Doe v. Poelker.

Dear Sirs:

Enclosed herewith to each of you is copy of order entered by us today in the above case at the direction of the Court.

Very truly yours

/s/ ROBERT C. TUCKER
Clerk

eh

enc.

United States Court of Appeals
for the Eighth Circuit

No. 75-1069

Jane Doe, et al.,
Appellants,
v.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

ORDER

The petition for rehearing and suggestions for rehearing en banc is denied. This Court in response to the motion of the appellees for rehearing en banc, hereby modifies its memorandum opinion filed April 14, 1975, as follows:

1. Pages 11 and 14 are withdrawn and replaced by new pages 11 and 14, attached hereto and by reference made a part hereof.

Dated this 7th day of May, 1975.

A true copy.

Attest

Clerk, U.S. Court of Appeals,
Eighth Circuit

the city hospitals to be an unconstitutional denial of equal protection to those indigent pregnant women who, in exercising their right to privacy, may choose to terminate the pregnancy under the guidelines laid down by *Roe v. Wade, supra,* and *Doe v. Bolton,* 410 U.S. 179 (1973). We hold that both city owned hospital facilities must be made available for abortion services as they are for other medical procedures. *Nyberg v. City of Virginia, supra,* 495 F.2d at 1347.

We remand the cause to the district court for the fashioning of prompt and appropriate declaratory relief. In addition to declaring the necessity to change the city's anti-abortion hospital policy, this relief should, at a minimum, impose upon the city the duty to obtain the services of responsible physicians and other necessary personnel whose personal views on abortion do not prohibit them from providing an abortion. It must also provide the necessary equipment and facilities to accomplish the goal. In short, the city will not be allowed to achieve indirectly through its manner of staffing its hospitals what it cannot accomplish directly—the prohibition of all nontherapeutic abortions in those hospitals. As stated by the Supreme Court in the context of school desegregation:

> [C]onstitutional rights . . . not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted "ingeniously or ingenuously."

Cooper v. Aaron, 358 U.S. 1, 17 (1958).

We stress, however, that the remedy is to be directed at the city officials acting as such and should declare the necessity

court is directed to determine attorneys' fees and to award them to Doe, together with court costs, against the defendant Poelker

for that portion of this case carried on in that court. This should be a fair award based on the guidelines listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

Conclusion

For the reasons discussed in this opinion the judgment of the district court is reversed and the case is remanded for the prompt fashioning of declaratory[10] relief and for awarding attorneys' fees to the appellant Doe for services in the district court.

A true copy.

Attest

/s/ ROBERT C. TUCKER
Clerk
Court of Appeals
Eighth Circuit

(Seal)

---

[10] There is no question but that injunctive relief rather than declaratory relief would be the proper remedy in this case. However, after requesting injunctive relief in her complaint, plaintiff later specifically withdrew that request. Under these circumstances we hesitate to invoke Fed. R. Civ. P. 54(c).

United States Court of Appeals
for the Eighth Circuit
St. Louis, Mo. 63101

June 2, 1975

Robert C. Tucker, Clerk
Mr. Jack L. Koehr
City Counselor
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103

Mr. Frank Susman
Susman, Schermer, Willer & Rimmel
7733 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105

Re: No. 75-1069. Doe v. Poelker.

Dear Sirs:

Enclosed herewith to each of you is copy of order entered by us today in the above case at the direction of the Court.

Very truly yours

/s/ ROBERT C. TUCKER
Clerk

eh

enc.

United States Court of Appeals
For the Eighth Circuit

No. 75-1069

Jane Doe, et al.,
Appellants,
v.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospital and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

ORDER

(Filed June 2, 1975)

This Court, in response to the motion of the appellees to amend judgment by striking that portion of our opinion relating to attorneys' fees based upon the recent case of *Ayleska Pipeline Service Co. v. Wilderness Society*, 43 U.S.L.W. 4561 (U.S. May 12, 1975), herewith withdraws pages 12, 13 and 14 of the Court's opinion, as revised by our order of May 7, 1975, and substitutes therefor pages 12 to 20, inclusive, the original of which new pages are attached hereto and by reference made a part hereof.

Because of the change in substance of the attorneys' fee portion of the opinion made necessary by *Alyeska Pipeline*, the appellees are given an additional 14 days within which to file a second petition for rehearing or rehearing en banc. Such petition shall be limited solely to the changes made in the section of the opinion relating to attorneys' fees, after the ruling on which, the appellee may, if it so desires, renew its request for stay of mandate pending appeal.

Dated this 2nd day of June, 1975.

A true copy.

Attest: /s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals, Eighth Circuit

(Seal)

to take certain official actions. It should not require that any present member of the staff of the public hospitals or any individual employee of the hospitals participate or assist in any way in the performance of abortions if, as a matter of conscience, he objects to so doing. *See Doe v. Hale Hospital*, 500 F.2d 144, 147 (1st Cir. 1974), *cert. denied*, 43 U.S.L.W. 3416 (U.S. Jan. 28, 1975); *Nyberg v. City of Virginia, supra*, 495 F.2d at 1347.

Attorneys' Fees

On appeal Doe asks that she be awarded attorneys' fees as costs. The traditional American rule ordinarily disfavors allowance of attorneys' fees to the prevailing party. It is clear, however, that the federal courts do have equitable power to award such fees when, in the interests of justice, the situation calls for them to do so. *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166 (1939).

Prior to the recent Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 43 U.S.L.W. 4561 (U.S. May 12, 1975), we had believed that one recognized exception to the American rule was where a party acted as a "private attorney general" in vindicating an important public policy. *See Fowler v. Schwarzwalder*, 498 F.2d 143, 145-146 (8th Cir. 1974). However, the *Alyeska Pipeline* opinion has now conclusively established that the "private attorney general" exception exists only where provided by specific congressional act. *Alyeska Pipeline Service Co. v. Wilderness Society, supra*, 43 U.S.L.W. at 4570. Therefore, attorneys' fees may not be awarded under this theory in the instant case.

Nonetheless, we are convinced that an award of attorneys' fees to Doe is proper here under another exception to the rule which was spcifically recognized and reiterated in *Alyeska Pipeline*—"when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* at 4567 (*quoting F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)). *See, e.g., Fowler v. Schwarzwalder, supra*, 498 F.2d at 144 (dictum); *Bell v. School Board*, 321 F.2d 494, 500 (4th Cir. 1963).

The long history of abortion litigation involving the State of Missouri and the City of St. Louis certainly suggests that these governments have delayed complying with the clear dictates of the Supreme Court and this Court relating to abortion to the maximum extent and have obstinately continued to implement and enforce statutes, regulations and policies designed to circumvent the constitutional law declared by the Supreme Court. *See Wulff v. Singleton, supra; Doe v. Poelker, supra; Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974). More specifically, the history of this particular litigation reveals a wanton, callous disregard for the constitutional rights of indigent pregnant women continuing long after those rights had been clearly enunciated by the Supreme Court in *Roe v. Wade, supra*, and *Doe v. Bolton, supra*.

Mayor Poelker took office in the Spring of 1973, after *Roe* and *Doe* were decided in January of that year. Nonetheless, he deliberately ordered that the city's anti-abortion policy be kept in effect because "[a]t the early stages there was . . . some contest to the decision as it applied [in Missouri]" and because of his "own personal conviction that abortion is murder." This implementation of his own personal moral pre-

cepts was done in spite of the recommendation of Dr. Wochner "that abortions should be provided under circumstances broader than that defined by the phrase, 'When the mother's life is in jeopardy.' "

When Doe finally challenged the policy by filing the instant complaint the city,[8] as soon as it learned that her pregnancy

[8] An indication of the intransigent attitude of the Mayor of the City of St. Louis toward the subject of abortion, and his complete rejection of the mandates of the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), is found in his answer to the complaint, some portions of which are set forth as follows:

> Abortion, for reasons other than to save the mother from grave physiological injury or death, is against and contrary to the laws and public policy of the State and City.
>
> Abortion, for reasons other than to safeguard the mother from grave physiological bodily injury or death, has never been within those medical services rendered by the hospitals of the City of St. Louis and has been both illegal (as aforesaid) and outside of, contrary to and prohibited by medical policies and judgment of the medical authorities of such hospitals.
>
> The City and its inhabitants, acting through duly empowered representatives, has the right to make reasonable determinations as to what medical services shall be supplied in the public hospitals of such City; and abortion, other than to protect the mother from grave physiological injury or death, is a medical procedure which lawfully can and has been reasonably excluded from such services given by the City's hospitals.
>
> . . . . . .
>
> All qualified natural persons have an inalienable natural right to participate in the institution of marriage, which no government has any lawful right to deny or substantially interfere with.
>
> . . . . . .

had been terminated, sought to have that complaint dismissed for lack of standing even though, as this Court pointed out on appeal from the resulting dismissal, the "conclusion that Doe has standing is mandated by the resolution of the identical issue

in Roe v. Wade, *supra*, 410 U.S. at 124, and Doe v. Bolton, *supra*, 410 U.S. at 187." *Doe v. Poelker*, *supra*, 497 F.2d at

> The people of the United States, and particularly the people of the State of Missouri, have a natural right, and a United States Constitutional right to have the Government of the United States, including its judiciary, protect, conserve and guard the institution of marriage in its essential character aforesaid, and to not disturb, negate and destroy such institution by purporting to grant to a female within such institution a unilateral, unconditional right to decide whether to bear children resulting from such marriage, and to carry out through abortion her negative decision.
>
> For the Government of the United States to purport to grant such right to such a female as aforesaid, including plaintiff, is a fundamental violation of the natural rights of the people of the United States and particularly the people of the State of Missouri, and for the Constitution of the United States by asserting powers prohibited by Article IX of the Amendments of said Constitution and not delegated but reserved by the people according to Article X of the Constitution.
>
> . . . . . .
>
> For the United States Government to so alter the institution of marriage in its essential nature and character would be a purported amendment of the Constitution of the United States by a method or way unauthorized by said Constitution and particularly Article V, thereof, in violation of said Ninth and Tenth Amendments of the United States Constitution and a violation of the distributive individual rights of the people of Missouri, and person, particularly the husband in each marriage existent of the State of Missouri, to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.
>
> — 15 —

1066. (Poelker did not attempt to appeal this decision.) In short, well over a year after *Roe* and *Doe* were decided the city was still arguing that a pregnant woman lost her standing to challenge abortion laws once her pregnancy terminated, in spite of the clear dictates of the Supreme Court to the contrary. This, of course, was an effective tactic to delay a decision on the merits; but we believe the record is clear that it was pursued for an oppressive reason—to keep indigent pregnant women from exercising their constitutional rights in the abortion decision for the maximum period of time.

We simply cannot close our eyes to a course of conduct in policy-making and litigating which, at the very least, reflects a wanton disregard for the constitutional rights of the plaintiff and other indigent pregnant women in St. Louis. Neither can we ignore the fact that the unconstitutional city policy was designed by Mayor Poelker to operate against a class of individuals whose economic status was such as to leave them relatively defenseless against this violation of their rights. The city has been obdurate and obstinate in compelling these women to conform to the mayor's personal moral beliefs on the abortion issue. The fact that no abortions have been performed in the city's hospitals since the *Roe* and *Doe* decisions attests to the effective and oppressive nature of the mayor's policy and the defense of it in the courts.

Accordingly, we award Doe attorneys' fees for the appellate portion of this litigation in the sum of $3,500 against the defendant Poelker.[9] On remand the district court is directed to

[9] The evidence reveals that defendant Wochner was an appointee of the mayor and that he was simply carrying out his superior's orders in implementing the city policy. Therefore, we do not feel that attorneys' fees should be awarded against him.

determine attorneys' fees and to award them to Doe, together with court costs, against the defendant Poelker for that portion of this case carried on in that court. This should be a fair award based on the guidelines listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

Conclusion

For the reasons discussed in this opinion the judgment of the district court is reversed and the case is remanded for the

prompt fashioning of the declaratory[10] relief and for awarding attorneys' fees to the appellant Doe for services in the district court.

VAN OOSTERHOUT, Senior Circuit Judge, concurring in part and dissenting in part.

The effect of the amended opinion of the majority is to vacate the award of attorneys' fees under the private attorney general exception to the prevailing American rule disallowing attorneys' fees to the successful party and the granting of attorneys' fees under the bad faith exception to the general rule. I agree with the majority that the vacation of our prior allowance

[10] There is no question but that injunctive relief rather than declaratory relief would be the proper remedy in this case. However, after requesting injunctive relief in her complaint, plaintiff later specifically withdrew that request. Under these circumstances we hesitate to invoke Fed. R. Civ. P. 54(c).

of attorneys' fees on appeal under the private attorney general exception is required by *Alyeska Pipe Line Service Co. v. Wilderness Society*, — U.S. — (43 U.S.L.W. 4561, May 12, 1975). I dissent from the award of attorneys' fees on appeal and the remand to the district court with direction to award attorneys' fees for services in the district court on the basis that the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. My dissent is based on several grounds.

I

The plaintiffs have not met the burden resting upon them to demonstrate that they properly raised the issue of their right to attorneys' fees on the basis of the bad faith exception to the general rule. It is well-settled law that issues not raised in the

trial court or upon appeal cannot be considered by an appellate court as a basis for reversal. *See Smith v. American Guild of Variety Artists*, 368 F.2d 511, 514-515 (8th Cir. 1966), and cases there cited. Plaintiffs in their brief upon appeal state: "Appellants respectfully request that pursuant to the jurisdictional grounds of their 'Complaint', specifically set forth in paragraph 1 of same, this Honorable Court award to appellants a reasonable attorneys' fees." Paragraph 1 of the complaint merely sets out the jurisdictional basis for the action and makes no claim either in that paragraph or in the prayer for attorneys' fees. Plaintiffs in brief argue that they are entitled to attorneys' fees under the private attorney general exception to the general rule. No mention is made of the bad faith exception claim.

It is unfair to the trial court and the litigants to allow the recovery of attorneys' fees on the basis of an issue not raised in the trial court or properly raised upon appeal. Under such

circumstances, the litigants are not afforded a fair opportunity to meet the issue by evidence or briefs. Upon the original submission of the appeal the bad faith issue was not briefed.

II

No fact finding on the bad faith issue was made by the trial court. No request for a Rule 52(b) amendment for a finding upon the issue was made.

Under Rule 52(a), in cases tried to the court the trial court is the appropriate fact finder. The trial court's findings can be set aside only if clearly erroneous. We have no right to try cases de novo. Thus if contrary to what has heretofore been said, the bad faith exception is properly before us, the case should be remanded to the trial court for determination of such issue.

III

The discretion for awarding attorneys' fees under appropriate circumstances, absent statute or contract providing for such fees, rests in the trial court subject to review for abuse of discretion. We cannot substitute our discretion for that of the trial court.

IV

Alyeska recognizes that upon a proper record attorneys' fees can be granted in the court's discretion for willful disobedience of a court order or bad faith. The Supreme Court in that case rejected the attorneys' fees award granted on the basis of private attorney general exception but did not proceed to determine

whether such relief could be granted under another exception to the general rule nor did it remand the case for such determination.

Since I am of the view that the resolution of the attorneys' fees on the bad faith issue is not properly before us, I express no view on the merits of such contention. I dissent from the award of attorneys' fees on appeal and the remand to the district court for mandatory determination of attorneys' fees in that court.

A true copy.

Attest:

/s/ ROBERT C. TUCKER
Clerk
U. S. Court of Appeals,
Eighth Circuit

(Seal)

United States Court of Appeals
For the Eighth Circuit

No. 75-1069 September Term, 1974

Jane Doe, et al.,
Appellants,
vs.
John H. Poelker, etc., et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

(Filed June 24, 1975)

The Court having considered second petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the second petition for rehearing en banc be, and it is hereby, denied.

Considering the second petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 24, 1975

A True Copy.

Attest:

ROBERT C. TUCKER
Clerk
U.S. Court of Appeals
8th Circuit

(Seal)

In the United States District Court
Eastern District of Missouri
Eastern Division

Jane Doe, et al.,
Plaintiffs,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.,
Defendants.

No. 73C 565(A)

ORDER

(Filed August 8, 1975)

Pursuant to the opinion filed April 14, 1975, as modified on May 7, 1975, and June 2, 1975, and the mandate of the United States Court of Appeals for the Eighth Circuit, issued on July 8, 1975,

It Is Hereby Ordered, Adjudged and Decreed as Follows:

1. The policy of defendants prohibiting all nontherapeutic abortions in the general, public hospitals of the City of St. Louis, Missouri, are hereby declared to be unconstitutional.

2. It is further declared that the defendants, in their official capacities, have the duty to take whatever actions may be reasonably necessary to effect a change in the policy and procedures prohibiting all nontherapuetic abortions in the general, public hospitals of the City of St. Louis.

/s/ ROY W. HARPER
U. S. District Judge

In the United States District Court
Eastern District of Missouri
Eastern Division

Jane Doe, et al.,
Plaintiffs,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.,
Defendants.
No. 73C 565(A)

MEMORANDUM AND ORDER

(Filed August 8, 1975)

This case is before the Court for the prompt fashioning of declaratory relief and for awarding attorneys' fees to attorneys for the appellant Doe for services in said District Court in accordance with the mandate of the Eighth Circuit Court of Appeals.

With respect to the awarding of attorneys' fees, the Eighth Circuit Court of Appeals at pages 16-17 of its slip opinion said: "On remand the District Court is directed to determine attorneys' fees and to award them to Doe, together with court costs, against the defendant Poelker for that portion of this case carried on in that court. This should be a fair award based on the guidelines listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714, 717-719 (5th Cir. 1974)."

Upon receipt of the mandate from the Eighth Circuit Court of Appeals a hearing was set, and at the hearing testimony was introduced with respect to the attorneys' fees. Frank Susman, an attorney for the plaintiffs, testified that he had personally

spent 144 hours working on the case, at a reasonable value of $60.00 an hour; that two of his associates, Newman and Komen, had worked on the case; that Newman had worked 10½ hours in 1973 and that the value of such services was $35.00 an hour; that Newman had worked 44.4 hours in 1974 and that the reasonable value of said services was $45.00 an hour; that Komen had worked 5.6 hours on the case in 1974, and that the value of such services was $45.00; and that the total fee which had been requested was $11,257.50.

Mr. Susman further testified with respect to a letter (Exhibit A), in which he had stated that Jane Doe, the plaintiff, had no obligation to pay any costs or attorneys' fees in said case. He further testified that in the initial discussion with respect to the case that he, the plaintiff, Joyce Armstrong, the Executive Secretary of American Civil Liberties Union, and associate Newman, had discussed the possibility of bringing the case, and that Jane Doe, the plaintiff, was advised that she would not be responsible for any attorneys' fees or costs, and that there was no agreement with Jane Doe at that time to turn over anything to ACLU. He further testified that he would not receive any fee for the handling of the case, and that any fee allowed would be turned over in full to ACLU, according to their policy. He did not include in his petition any request for an attorney's fee, and no proof was put on before the Court in the trial of the case with respect to attorneys' fees.

He further stated that he is a dues-paying member of the American Civil Liberties Union of Eastern Missouri, and that the petition is signed by him, below which is typed: "FRANK SUSMAN, of the American Civil Liberties Union of Eastern Missouri, Attorney for Plaintiff."

Mr. Susman further testified that some six months ago he had talked with Jane Doe and there was some discussion of fees, and where they would go, and it was clearly understood

they would go to ACLU. He further testified that he made no distinction with respect to charges per hour for his work between legal work and investigative work.

Courtney Shands, an attorney, testified that the legal rates referred to were reasonable in the St. Louis area.

Ben Usetel testified that the $60.00 per hour for Mr. Susman was reasonable, but that in his office, the associates' rates were $40.00 rather than $45.00 per hour.

Jane Doe testified that she had not in writing agreed to turn over any attorneys' fees to ACLU, nor does she recall any such oral agreement. She further testified she was not aware of any attorneys' fees to be allowed to her, and that this was the first she knew of it.

The record in this case discloses that the actual time spent in court in the trial of this case on the day it was set was approximately two hours and forty-five minutes, and that while the court had conferences with the attorneys, the motions for the most part were submitted on briefs without oral argument.

Under the guidelines set out in *Johnson v. Georgia Highway Express, Inc.*, supra, considering the length of time spent in the trial of the case, considering the policy of the attorneys with respect to charging for legal and investigative work, in the court's opinion the sum of $9,317.50 is a reasonable fee for the services in this case, if a fee is to be allowed. The Court of Appeals, as above set out, directed that the attorneys' fees should be based on the guidelines listed in *Johnson*, supra, pages 717-719. At page 718, the Court had this to say:

> "* * * In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay * * *."

In view of the mandate of the Eighth Circuit Court of Appeals directing that the attorneys' fee be based on the guidelines listed in the *Johnson* case, and in view of the fact that the above quote is a part of those guidelines, no attorneys' fee is allowed to the plaintiff, Jane Doe, in this case.

/s/ ROY W. HARPER
U. S. District Judge

In the United States District Court
For the Eastern District of Missouri
Eastern Division

Jane Doe, *et al.*,
Plaintiffs,

vs.

John H. Poelker, Mayor of the City of St. Louis, Missouri, *et al.*,
Defendants.

Cause No. 73C565A

NOTICE OF APPEAL

(Filed August 14, 1975)

Notice is hereby given that plaintiffs, Jane Doe and the class she represents, hereby appeal to the United States Court of Appeals for the Eighth Circuit from an "Order" and "Memorandum and Order," entered on August 8, 1975, failing to award the reasonable amount of attorneys' fees, determined by the District Court to be Nine Thousand Three Hundred Seventeen and 50/100 Dollars ($9,317.50), and failing to assess Court costs against defendant Poelker.

SUSMAN, SCHERMER, WILLER
& RIMMEL
/s/ FRANK SUSMAN
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Plaintiffs

United States District Court
Eastern District of Missouri
Office of the Clerk
Saint Louis, Missouri 63101

William D. Rund, Clerk
Jack L. Koehr
City Counselor
Rm. 314, City Hall
1200 Market St.
St. Louis, Missouri 63103

Re: Case No. 73C 565 (A)
Jane Doe vs. John H. Poelker, et al.

Enclosed herewith is a copy of a Notice of Appeal filed in the above case together with a copy of the Clerk's docket entries.

You are also advised that all parties and counsel are expected to comply strictly with all rules applicable to the appellate process prescribed by the the Federal Rules of Appellate Procedure, the Rules of the United States Court of Appeals for the Eighth Circuit and to follow the procedural steps set out in the handbook of Practice and Procedure in the United States Court of Appeals for the Eighth Circuit.

Very truly yours,

WILLIAM D. RUND, Clerk
By /s/ JAMES R. VILLANI
Deputy Clerk

Enclosures

cc: Official Court Reporter

United States Court of Appeals
For the Eighth Circuit
St. Louis, Mo. 63101

Robert C. Tucker, Clerk

August 22, 1975

Mr. Frank Susman
7733 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105

Mr. Eugene P. Freeman
Deputy City Counselor
Room 314 City Hall
1200 Market Street
St. Louis, Missouri 63103

Re: 75-1648. Jane Doe, et al. v.
Mayor Poelker, et al.

Dear Sirs:

Enclosed herewith to each of you please find copy of an order entered by us today at the direction of the court.

Briefs called for in the order today may be typewritten and Xeroxed on letter-size paper, fastened in the left margin. I will need an original and four copies and additional copies should, of course, be served on opposing counsel.

It is my intention to set this case down for submission to a panel of judges at the session to be held the week of October 13, 1975, in St. Paul, Minnesota.

Very truly yours,

ROBERT C. TUCKER
Clerk

a
Enc.

copy
Mr. William D. Rund, Clerk
United States District Court
St. Louis, Missouri
Appeals Expediter

United States Court of Appeals
For the Eighth Circuit

75-1648 September Term, 1974

Jane Doe, et al.,
Appellants,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

For cause shown it is now here ordered:

1) Counsel for the parties to this appeal may omit preparation of appendix. The court will consider the appeal on a designated record pursuant to local rule 11. Counsel for appellants may have to and including September 2, 1975, in which to file opening rule 11 designation with the clerk of the United States District Court for the Eastern District of Missouri in case No. 73-C-565(A).

2) It is further ordered that appellants may have to and including September 12, 1975, in which to serve and file opening briefs and appellees may have to and including October 3, 1975, in which to serve and file answer briefs.

August 22, 1975

CHARTER

of the

CITY OF SAINT LOUIS, MISSOURI

Adopted by the Vote of the People, June 30, 1914

In Effect From

AUGUST 29, 1914

As Amended Pursuant to Ordinances

33644—35368—39898—42021—42060—43505
43548—44822—47117—49101—49502—49540
49821 and 50165

CONTENTS

Charter

Article		Page
I	Incorporation	1
II	Elections	14
III	Recall of Elective Officers	15
IV	Board of Aldermen	17
V	Initiative	22
VI	Referendum	24
VII	Mayor	26
VIII	City Officers and Employees	28
IX	Register	31
X	Law Department	31
XI	City Marshal	32

Article		Page
XII	City Courts	32
XIII	Board of Public Service	33
XIV	Art Museum and Zoological Park	43
XV	Department of Finance	43
XVI	Board of Estimate and Apportionment	50
XVII	City Bonds	51
XVIII	Civil Service	54
XIX	Franchises	73
XX	License Taxes	75
XXI	Eminent Domain	75
XXII	Public Works and Improvements	86
XXIII	Special Tax Bills	94
XXIV	Improvement Bonds and Funds	97
XXV	Miscellaneous Provisions	99
	Schedule (Transitional Provisions)	101

Scheme

Chapter		Page
Scheme		105

Article XVIII. Civil Service[4]

Section 1. Definitions.—The terms defined in this section, when used in this article, have the following meanings except where the context clearly requires otherwise:

(*a*) "*Appointing authority*" means any person or group of persons having power by law or ordinance, or by lawfully delegated authority, to make appointments to any position in the city service.

(*b*) "*City service*" or "*service of the city*" means all positions as herein defined, that are subject to control and regulation by the City of St. Louis as a municipal corporation or any of its officers or other agencies as such.

(*c*) "*Class*" or "*class of positions*" means a definitely recognized kind of employment in the classified service designed to embrace all positions sufficiently alike to be treated alike.

(*d*) "*Classified service*" means all positions in the city service except those specifically placed in the unclassified service as herein defined.

(*e*) "*Compensation*" means the salary, wages, fees, allowances and all other forms of valuable consideration, earned by or paid to any employe by reason of service in any position, but does not include any allowance for expenses authorized and incurred as incidents to employment.

(*f*) "*Competitive position*" means any position in the classified service not expressly designated as an excepted position in this section.

(*g*) "*Examination*" means all the tests of fitness, taken together, that are applied to determine the fitness of applicants for positions of any class.

---

[4] *Editor's note.*—This article is an amendment to the charter which was adopted pursuant to Ordinance 42021.

(*h*) *"Excepted position"* means any position in the classified service not subject to the provisions of this article requiring competitive tests of fitness for appointment and such other provisions as, by their terms, apply specifically to competitive positions alone. All such positions, however, shall be subject to all the other provisions of this article insofar as consistent with law and with this exception. The following described positions, and no others, shall be deemed to be excepted positions:

(1) all positions filled by election of the people;

(2) all positions of heads of principal departments and of independent agencies, that are filled by appointment by the mayor;

(3) one position of executive secretary and one position of secretary and stenographer to the mayor;

(4) all positions of paid members of boards;

(5) all officers and employees of the board of aldermen.

(*i*) *"Employe"* means a person legally occupying a position.

(*j*) *"Grade"* means all positions or classes of positions in the city service that are determined to be of the same level with respect to the difficulty and responsibility of their duties and any other measure of value, and for which the same rate or scale of rates of compensation is prescribed, under the provisions of this article.

(*k*) *"Position"* means any appointive or elective office, and any employment, or two or more of such offices and employments the duties of which call for services to be rendered by one person.

(*l*) *"Test of fitness"* means any means or measure for determining the merit and fitness of persons for original appointment or promotion to positions of a class; and

(*m*) *"Unclassified service"* means all positions not subject to the provisions of the charter, ordinances and civil service rules relating exclusively to positions in the classified service, and includes positions, as follows, and no others:

(1) all positions of members of boards, commissions or committees serving without compensation;

(2) all other positions in which services are rendered without compensation;

(3) all officers and employes of the board of aldermen.

Sec. 2. *Purpose and basic requirements of article.*—It is the purpose of this article to provide a modern and comprehensive system of personnel administration for city, whereby economy and effectiveness in the personal services rendered to the city, and fairness and equity to the employes and the taxpayers of the city, alike, may be promoted. To accomplish this end the provisions of this article shall be liberally construed.

The following principles and policies shall be observed, as basic requirements:

(a) *Merit and fitness.*—All appointments and promotions to positions in the service of the city and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be on the sole basis of merit and fitness, which so far as practicable, shall be ascertained by means of competitive tests, or service ratings, or both.

(b) *Rates of pay.*—Fair and equitable rates of pay shall be provided with the consideration of both the employes and the taxpayers and with due observance of the principle of like pay for like work, and suitable differences in pay for differences in work.

(c) *Employes' interests.*—Consideration shall be given to the desires and interests of the employes insofar as consistent

with the best interests of the city as an employer, and of the public served.

(d) *Nature of city service.*—The city service, so far as practicable, shall be made attractive as a career, and each employe shall be encouraged to render his best service in willing compliance with the provisions of this article.

Sec. 3. *Scope of civil service rules.*—To give effect to the purpose and requirements set forth in the next preceding section, the civil services rules hereinafter required to be adopted shall provide for the following things, among others, with relation to the classified service as defined herein:

(a) *Classification plan.*—For a systematic classification plan providing for the classification of all positions on the basis of their duties, responsibilities and resulting qualification requirements; for definitions of the classes in the classification plan; for the allocation of all positions to their appropriate classes in the classification plan; and, for the amendment and continuous administration of the classification plan. No person shall be employed or paid in any position until the class of such position has been determined by allocation of the position by the director to its appropriate class.

(b) *Compensation plan.*—For development and recommendation to the mayor and aldermen of a systematic compensation plan, and amendments thereto from time to time as deemed necessary, to provide for uniform scales of compensation for all positions of the several classes, by grades, with due relationships among scales of compensation of the several grades, and for the continuous administration of such compensation plan as is adopted by ordinance.

(c) *Competitive examinations.*—For determining merit and fitness for appointment and promotion to competitive positions by means of competitive examinations held after due public

notice. The tests of fitness in such examination shall be practical in character and designed fairly to measure the relative qualifications of candidates for positions of the several classes.

(d) *Certification and appointment of eligibles.*—For certification of eligibles and for appointment and promotion to competitive positions on the basis of such tests, subject to a working test period of probation not to exceed one year. One of the highest three (3) eligibles certified or remaining on the list of eligibles certified to be appointed to each vacancy.

(e) *Filling vacancies; promotions.*—For filling vacancies in higher competitive positions, so far as practicable, by means of promotion on competitive examination except where vacancies are filled, in the interests of the service, by demotion, transfer, reinstatement or re-employment, in the order of preference here indicated, where applicable. Promotion on competitive examination shall be deemed to be practicable whenever there are qualified employes in positions of lower classes who are willing to compete.

(f) *Tenure of employment.*—For indefinite tenure of employment in positions in the classified service during meritorious service, except in cases for which indefinite terms are prescribed by law or charter, and except in cases of temporary appointment hereunder, but with due provision for layoff on termination of the need for employment in any position or of funds available therefor.

(g) *Temporary appointments.*—For temporary appointments, without competitive tests, to competitive positions, for not to exceed sixty days in any case, which shall not be renewed or extended. Such temporary appointments to be provided for shall include provisional appointments in the absence of available eligibles pending establishment of eligible registers and certification and appointment therefrom, transient appointments for

short jobs of work, and emergency appointments pending filling of vacancies by other means than such emergency appointments.

(h) *Service standards and ratings.*—For the establishment of standards of service and a system of service ratings. The service ratings provided shall be given consideration in examinations for promotions, and in connection with increases in pay, layoffs, reemployments, transfers, reinstatements, reductions in pay, demotions and removals hereunder. Standards of service shall be established which any employe must meet to qualify for an increase in pay, reinstatement, re-employment or promotion, and other standards shall be established, failure to meet which shall result in action for decrease in pay, demotion or removal.

(i) *Welfare programs.*—For cooperation by the director with appointing authorities in promoting programs of employe welfare, including such training, health, recreation, economic and other programs as may be deemed desirable.

(j) *Transfers.*—For transfers between competitive positions of the same grade for which no additional or different tests of fitness are required, in the same or different departments, for the benefit of the service directly, or indirectly for such benefit by promotion of satisfaction of the employes, or by elimination of supernumerary positions.

(k) *Reinstatement.*—For reinstatement to and re-employment in competitive positions after layoff, and after other separation without delinquency or misconduct, where the interests of the service will be served thereby.

(l) *Hours of duty, holidays and leaves.*—For recommendations by the commission to the mayor and aldermen, regarding ordinance provisions to regulate the hours of duty, holidays and leaves of absence, and for administration of any such ordinances

adopted. Such ordinance provisions as are adopted shall be administered and carried into effect by the department of personnel herein provided for. The minimum daily, weekly and annual service required under regular full-time employment shall be fixed by ordinance with due relation to the requirements in private employment in the city and with a view to equity as between positions of different classes and those under different appointing authorities. The requirements may vary for different classes or conditions of employment but shall be uniform in their application to employes of the same classes under like conditions of work. The ordinance provisions shall be enforced by effective control of attendance and absence and audit of pay rolls with reference thereto. Each employe in the classified service shall be required to engage in the actual work of the office or employment held to such extent as his services may be required for the complete discharge of the duties of such office or employment and a failure so to do shall be ground for removal.

(m) *Part-time services.*—For payment for part-time services on an equitable basis in relation to the hour employed as compared with the requirements for full-time service. Where less than full-time service is required or rendered in any position, compensation for such service shall be paid on the part-time basis established by such rules.

(n) *Removals and demotions.*—For removals, demotions and decreases in pay in the cases of employes whose service rendered is below satisfactory standards, designed to promote the efficiency of the service. Such action shall be effective only after written notice to, with right of appeal in, the employes affected, and after such investigation as is appropriate to insure that the action taken is on the sole ground of merit and fitness.

(o) *Fines and suspensions.*—For fines, and for suspensions without pay for not to exceed thirty days, and for other dis-

ciplinary measures deemed desirable, of less severity than those set forth in the item next preceding.

(p) *Resignations.*—For resignations in good standing, for investigation of reported resignations to determine their good faith, for records of the causes of resignations, and for initiating action to remove causes leading to excessive numbers of resignations of capable employes.

(q) *Roster of employes.*—For maintenance of a complete official roster of employes showing for each employe, his name, address, class title, rate of pay, and changes in any of them, and such other information as may be deemed desirable.

(r) *Retirement system.*—For recommendation if and when permissible under the constitution and laws of the state of Missouri, to the mayor and aldermen by the civil service commission of a suitable system for the retirement of employes who, by reason of injury, ill health or age, have become incapacitated for rendering satisfactory service, and for administration by the department of personnel of such retirement system as may be adopted by ordinance.

(s) *Reports by appointing officers.*—For reports by appointing officers of new positions and changes in the positions authorized and in the employments therein, and of attendance and absence, which upon approval by the director shall form basis for audit and approval of pay rolls by the comptroller as to compliance with this article and the rules and ordinances thereunder.

(t) *Audit of pay rolls.*—For audit of pay rolls by the comptroller as a condition precedent to payment by the treasurer or any other disbursing officer of any claim or account for personal services. The comptroller shall not approve any item of a pay roll or account for payment of any employe, or issue his warrant for any payment therefor, except on evidence satisfactory to him

that the person named has been lawfully employed in a position duly authorized and is entitled to payment for actual service in such position or authorized absences therefrom at the rates, for the periods and in the amounts, covered by such pay roll or account.

(u) *List of nonessential positions.*—For the listing of positions deemed nonessential for effective administration of the city's affairs, and for seeing that, as occasion arises, steps be taken toward transfer of the employes therein to any other vacant positions to which they are eligible to be transferred under the provisions of this article, and for prevention of filling of any vacancy occurring therein.

(v) *Administration.*—For the administration and enforcement of the provisions of this article and all provisions of ordinances and rules adopted in pursuance thereof, by the director, subject to the rules of the commission and subject to appeal to and review on appeal by the commission.

(w) *Examination fees.*—Such rules may provide for the charging and collection of reasonable fees from applicants for examinations as prerequisites to the acceptance of their applications, and in such amounts as are calcuated to pay part or all of the cost of preparing and holding the examinations and rating the results thereof.

Sec. 4. *Ordinances to be enacted.*—The mayor and aldermen shall provide, by ordinance:

(a) *Compensation plan.*—For adoption of a comprehensive compensation plan for the fixing of rates of pay of all employes in the classified service, and amendments thereto on recommendation of the civil service commission, and for its application and interpretation. Every appropriation and expenditure for personal services in any position in the classified service there-

after shall be made in accordance with the compensation plan so adopted and not otherwise.

(b) *Retirement system.*—For a contributory retirement system on a sound actuarial basis, if and when permissible under the constitution and laws of the State of Missouri, to provide for retirement of employes in the classified service who have become unable to render satisfactory service by reason of physical or mental incapacity.

(c) *Hours of duty and holidays.*—For regulating hours of duty, holidays, attendance and absence, in the classified service.

(d) *Appropriations for department of personnel.*—For appropriations for the purposes of the department of personnel, adequate to provide for the effective administration and enforcement of the provisions of this article and the rules and ordinances adopted thereunder. In each fiscal year, such appropriations shall aggregate not less than one-half of one percent of the amount of all expenditures for personal services in the city service in the fiscal year next preceding, and in default of such minimum appropriations or any part thereof, such minimum appropriations or any deficiency therein, nevertheless shall be deemed to have been made.

Sec. 5. *Department of personnel.*—There is hereby created a department of personnel of the government of the city which shall consist of a director of personnel as head thereof, a civil service commission and such other employes as may be needed.

Sec. 6. *Civil service commission—Composition.*—(a) *Qualifications, appointment and term of members.*—The civil service commission shall consist of three members who, on the dates of their appointment, shall have been citizens of the United States and residents of the City of St. Louis for at least two years next preceding. They shall be persons whose past records indicate that they favor the merit system of personnel administration.

No person shall be eligible to appointment as a member of the civil service commission who holds any other salaried public office or who has held any elective public office or elective position in any political party, or any paid position in any political party, within the four years next preceding the date of his appointment. Members shall be appointed by the mayor without regard to any political consideration. Within thirty days after the adoption of this section, the mayor shall appoint the first civil service commission, designating one member to serve for a term of two years, a second member for a term of four years and the third member for a term of six years from the first day of July, next preceding. All subsequent appointments of members of the commission shall be for six years, except that any vacancy in the membership of the commission occurring at a time other than the expiration of a term shall be filled by the appointment of a member to serve for the unexpired portion of the term.

(b) *Removal of members.*—The mayor may remove a member of the commission only upon charges of nonfeasance, malfeasance or misfeasance in office and after a public hearing to be held not less than ten days after notice to the members so charged, accompanied by a statement in writing of the specific acts charged. At the hearing, the member may be represented by an attorney and shall be entitled to present witnesses in his defense.

(c) *Compensation.*—Each member of the commission shall be paid fifteen dollars for each day on which he has actually attended a meeting of the commission officially held, as a member thereof, but in no case shall any member be paid more than sixteen hundred and eighty dollars in any one fiscal year.

Sec. 7. *Commission powers and duties.*—The commission shall have power, and it shall be its duty:

(a) *Administration.*—To describe, and to amend from time to time as such action is deemed to be desirable, rules for the administration and enforcement of the provisions of this article, and of any ordinance adopted in pursuance thereof, and not inconsistent therewith.

(b) *Ordinances.*—To recommend to the mayor and aldermen in accordance with this article, ordinances to provide for:

(1) a compensation plan providing properly related scales of pay for all grades of positions and rules for its interpretation and application;

(2) a plan for a system for retirement of superannuated and otherwise incapacitated employes, if any when permissible under the constitution and laws of the State of Missouri;

(3) regulation of hours of duty, holidays, attendance and absence;

(4) such other matters within the scope of this article as require action by the mayor and aldermen;

(5) such changes in any such matters from time to time as may be deemed to be warranted.

(c) *Investigations.*—To make such inquiries and investigations as it may deem to be warranted regarding the administration and effect of the provisions of this article and of ordinances and rules adopted in accordance therewith, and to make such recommendations to the director and to the mayor and aldermen as in its judgment may be warranted in the premises.

(d) *Decisions.*—To consider and determine any matter involved in the administration and enforcement of this article and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the director, or on appeal by any appointing authority, employee or taxpayer of the city, from any act of the director or of any appointing authority.

The decision of the commission in all such matters shall be final, subject, however, to any right of action under any law of the state or of the United States.

(e) *Director.*—To hold an examination for the position of director, whenever eligibles therefor are needed, and to certify eligibles resulting therefrom to the mayor, and also to perform all such duties with reference to that position as are assigned to the director as to all other positions in the classified service; and

(f) *Reports.*—To transmit to the mayor and aldermen, with such additions and comments as it may desire to make, such annual and special reports as the director of personnel may submit for its action.

(g) *Reinstatement of employes.*—To order the reinstatement without loss of pay of any employe who has been discharged, demoted or reduced in rank or compensation for religious, racial or political reasons.

(h) *Limitations.*—Except as provided in this section, the commission shall have no administrative powers or duties. Except as so provided, it shall have no power to direct or control any employe of the department of personnel or other employe of the city, or the action to be taken by any of them in any matter or case. Neither the commission nor any of its members shall have power to take any action except by majority vote in meeting assembled.

Sec. 8—*Director of personnel—Appointment; qualifications; compensation.*—The director of personnel shall be appointed by the mayor from a certification of eligibles made by the civil service commission from an eligible list established by means of competitive tests of fitness conducted by the civil service commission, within thirty days after such certification. One of the three eligibles standing highest on such certification who have all such duties with reference to that position as are assigned to

indicated their willingness to accept appointment shall be appointed by the mayor. The commission shall secure such information and assistance as may be practicable in formulating the fitness tests for director and rating the results, from persons experienced in public personnel administration.

Any person to become eligible for appointment as director shall have had not less than five years' experience in personnel administration, of which not less than two years shall have been in public personnel administration, and shall be conversant with the principles and techniques of modern public personnel administration. He need not be at the time of examination or appointment, a resident of the City of St. Louis.

All action under this section shall be subject to the other provisions of this article and the rules adopted in pursuance thereof, as far as consistent with this section.

The commission shall fix the initial salary of the director at not less than six thousand dollars a year to be in effect until a compensation plan is adopted hereunder. Thereafter the salary of the director shall conform to such compensation plan.

Sec. 9. Director's powers and duties generally; removal from office.—The director shall be the head of the department of personnel, responsible for the conduct of all of its affairs except as to such powers and duties as are vested in the commission by this article. He shall have power and it shall be his duty, in person or through the department of personnel:

(*a*) *Secretary of commission.*—To serve as secretary of the commission, to see to the keeping of the minutes and records thereof, to conduct investigations and prepare reports for the commission in matters under its consideration, and in all other proper ways to facilitate the actions and proceedings of the commission.

(*b*) *Appointment of employes; administration.*—To appoint all employes of the department of personnel except the director and the members of the commission, and to direct and control their work and, under the customary financial procedures of the city, the expenditures from appropriations for the department.

(*c*) *Roster of employes.*—To establish and maintain a roster of all city employes showing the salient facts of the employment history of each employe.

(*d*) *Preparation of rules.*—To prepare and recommend, for action by the commission, rules, including a classification plan and a service rating plan, drafts of ordinances for recommendation to the mayor and aldermen in matters requiring such ordinances, including a compensation plan, and changes as deemed desirable from time to time in such rules and ordinances.

(*e*) *Classification of positions.*—To allocate each position in the classified service to its appropriate class in the classification plan adopted under the provisions of this article, and reallocate positions as conditions warrant, from class to class.

(*f*) *Definitions of classes and grades.*—To prepare and maintain appropriate definitions of classes and grades in the classification plan and amend them from time to time as he may deem such action warranted.

(*g*) *Eligible lists.*—To hold examinations, pass upon the qualifications of applicants, and establish eligible lists, as needed, and to certify names of eligibles to appointing authorities for filling vacancies in competitive positions.

(*h*) *Employe programs.*—To cooperate with appointing officers and others in providing programs of training for employes, for employe welfare, for promoting of employe morale, and for otherwise raising of standards of performance in the service in every practicable way.

(*i*) *Employment transactions.*—To pass upon, for compliance with the provisions of the charter and ordinances and these rules, and approve or disapprove as to compliance therewith, all appointments, demotions, transfers, promotions, service ratings, leaves of absence, changes in rates of pay, suspensions, separations, and other employment transactions affecting the status of employes.

(*j*) *Investigations.*—To make such investigations as he may deem desirable with respect to the enforcement and effect of the personnel provisions of the charter and ordinances and of the rules, and such special investigations as the commission or the mayor may request and make special reports relative thereto.

(*k*) *Compensation plan.*—To devise and recommend to the commission a compensation plan consisting of scales of pay for the several grades or classes in due relation to each other and to rates prevailing for like employment in private industry, rules for the interpretation and application of the plan, and changes in such plan and rules from time to time as deemed desirable.

(*l*) *Administrative regulations.*—To make such administrative regulations as he may deem necessary, not inconsistent with the charter, ordinances applicable and these rules, relative to matters involved in the administration of the personnel provisions of such charter ordinances and rules.

(*m*) *Reports.*—To make annual reports to the commission for its approval and transmission to the mayor and aldermen on the work of the department and the administration and effect of this article, with such recommendations for action as he may deem desirable, and such special reports as may be requested by the commission or the mayor. Such reports shall be public records.

(*n*) *Nonessential positions.*—To aid the mayor and aldermen, and the several appointing officers, in determining the numbers and kinds of positions needed to carry on the city's

business and in discovering and labeling unnecessary positions in order that they may be designated as supernumerary, so that they may be eliminated as opportunity affords for transfer of the employes to other positions, under the provisions of this article, and so that, as they become vacant, steps may be taken to keep them from being filled.

(*o*) *Assistance to appointing authorities.*—To aid the mayor and aldermen, and appointing authorities in all practicable ways in handling other personnel matters relating to positions under their jurisdictions; and

(*p*) *Additional powers and duties.*—To do all other and further things necessary or proper for making effective the provisions of this article and all rules and ordinances adopted in pursuance thereof, and not inconsistent therewith, whether of the same kinds as those specified in this section, or of different kinds. The power of the director to make effective the provisions of this article and of ordinances shall not be deemed to be contingent on the adoption of rules but, in the absence of rules that are applicable, he shall have power to take such action, not inconsistent with this article or with ordinances pursuant thereto, as may be reasonably necessary and proper to effectuate the purposes thereof.

The personnel director may be removed from office only upon charges of nonfeasance, malfeasance or misfeasance in office and after a public hearing to be held not less than ten days after notice to the director accompanied by a statement in writing of the specific acts charged. The personnel director may be represented by an attorney and shall be entitled to present witnesses in his defense. The public hearing shall be conducted by the civil service commission. At the conclusion of the hearing, the commission shall recommend to the mayor whether or not the personnel director shall be removed from office. The mayor shall have the power to accept or reject the recommendation of the civil service commission and his decision shall be final.

Sec. 10. Selection of examiners and assistants; qualifications of employes.—The director of personnel may select suitable persons in the service of the city, with the consent of the appointing authorities, under whom such persons serve, to act as examiners under his direction or otherwise to assist in the administration of this article and the rules and ordinances adopted thereunder. It shall be deemed part of the official duties of all employes so selected, to render such services without extra compensation therefor and in addition to other qualifications required by this charter, all officers and employes, except day laborers, and except in such cases requiring scientific, mechanical, professional or educational qualifications as may be determined by the civil service commission, must have resided in the city for at least one year and failing or ceasing to so reside, shall forfeit their office or employment.

Sec. 11. Offices and facilities to be provided; unauthorized compensation.—It shall be the duty of all employes of the city to allow the reasonable use of public buildings, and to heat and light them as conditions may require, for holding examinations, and in all other proper ways to facilitate the holding of such examinations. All employes of the city shall grant the director of personnel and any agent authorized by him, free access to the premises, and the records relating to employes, under their control, during the usual business hours, and shall furnish them such facilities, assistance and information as may be required in carrying into effect the provisions of this article and the rules and ordinances adopted thereunder.

After notice to the comptroller by the director that any person is employed or is proposed to be paid as an employe in the classified service in any amount not provided for under the provisions of this article and any rules and ordinances in effect not inconsistent therewith, the comptroller shall be charged with notice thereof and shall not approve any further payment to such person except in accordance with such provisions.

Sec. 12. *Status of persons employed by city when article takes effect.*—Every person who, when this article takes effect, is legally occupying, by regular appointment thereto, a position placed by this article in the classified service, shall be entitled to continue to occupy such position, without further examination for such employment, and shall become subject to the provisions of this article, including the provisions relating to service rating, with the same effect as though he had been appointed to the position occupied, under the provisions of this article. The provisions of this section also shall apply to all persons who, on the date of acquisition of any public utility hereafter acquired by the city, are regularly employed by such utility.

Sec. 13. *Liability of officers and sureties for payment of unauthorized compensation.*—No claim of any person appointed or employed contrary to the provisions of this article or the rules and ordinances thereunder, whose payroll or account is refused approval or payment, shall be paid by the city, but the officer or officers appointing or employing, or attempting to appoint or employ any such person, and the sureties on his or their official bonds, shall be liable jointly and severally for the amount due to such person by reason of such employment or purported employment. No officer, during the time of his official service or thereafter, or his surety, or other person on behalf of either, shall be reimbursed by the city for any sum so paid or recovered. The city counselor, or special counsel designated therefor by the board of aldermen, shall prosecute such actions as may be necessary to recover any sums paid contrary to the provisions of this article from any officer or officers making the appointment or continuing the employment on which such payment was based, in contravention of the provisions of this article or of the rules and ordinances made in pursuance thereof, or any officer signing or countersigning or authorizing the signing or countersigning of any order or warrant for payment, or making any payment, therefor, or from the sureties of any such officer or officers on their official bonds.

Sec. 14. *Examination for licenses.*—The department of personnel, by agreement with any other department or other agency of the city government, may conduct examinations to determine the qualifications of applicants for licenses issued by such department or other agency, and certify the results thereof, subject to reimbursement of the reasonable costs of such service by transfer from the appropriations of the agency served to those of the department of personnel.

Sec. 15. *Unlawful conduct relating to examinations.*—No person shall willfully, by himself or in cooperation with any other defeat, deceive or obstruct any person in respect to his rights in relation to any tests of fitness or appointment to any position under the provisions of this article, and any rules or ordinances made thereunder, or shall willfully and falsely mark, grade, estimate or report upon the tests of fitness or proper standing of any person tested or certified pursuant to the provisions of this article or the service ratings of any employe, or aid in so doing, or shall willfully make any false representation concerning the same, or concerning any person tested, or shall willfully furnish to any person any special or secret information for the purpose of either improving or injuring the prospect or chances of any person in connection with any test or appointment, or shall impersonate any other person or permit or aid in any manner any other person to impersonate him, in connection with any test or appointment, or application or request to be examined.

Sec. 16. *Racial, political and religious discrimination.*—No recommendation or question under the authority of this article shall relate to the race, political or religious opinions, affiliations or service of any person. No person shall be appointed to a position in the classified service hereunder, nor be demoted, reemployed, promoted, removed, increased or reduced in compensation, nor in any other way be favored or discriminated against

in any matter within the purview of this article, because of his race, political or religious opinions, affiliations or service.

(As amended, pursuant to Ord. 43548.)

Sec. 17. *Political assessments and contributions.*—No person in the classified service shall be under any obligation to contribute to any political fund or to render any political service, and no such person shall do so or be removed or otherwise prejudiced for refusing to do so. No person in the city service shall discharge or promote or reduce, or in any manner change the official rank or compensation of any other person in such service, or promise or threaten so to do, for withholding or refusing to make any contribution of money or service or any other valuable thing for any political purpose, or in any other manner, directly or indirectly, use his official authority or influence to compel or induce any other person to pay or render any political assessment, subscription, contribution or service. Every such person who may have charge or control of any building, office or room occupied for any purpose of the government of the city, is hereby authorized to prohibit the entry of any person, and he shall not knowingly permit the entry of any person, for the purpose of therein making, collecting, receiving or giving notice of any political assessment, subscription or contribution; and no person shall enter or remain in any such office, building or room, or send or direct any letter or other writing thereto, for the purpose of giving notice of, demanding or collecting a political assessment, subscription or contribution, nor shall any person therein give notice of, demand, collect or receive any such assessment, subscription or contribution; no person shall prepare or make out, or take any part in preparing or making out, any political assessment, subscription or contribution with the intent that it shall be sent or presented to or collected from any employe in the classified service, and no person shall knowingly send or present any political assessment, subscription or contribution to, or request its payment of, any such employee.

Sec. 18. *Promises of official influence to affect political action.* —No person, while holding any city office, or while in nomination or seeking nomination to appointment to any such office, shall corruptly use or promise to use, directly or indirectly, any official authority or influence, possessed or anticipated, to confer upon any person, or to secure or aid any person in securing, any office or public employment, or any nomination, confirmation, promotion or increase of salary, upon the consideration or condition that the vote or political influence or action of any person shall be given or used in behalf of any candidate, officer or party, or upon any other corrupt condition or consideration. No person, being an officer of the city, or having or claiming any such authority or influence, in relation to the nomination, employment, confirmation, promotion, removal or increase or decrease of salary, of any employe, shall corruptly use, or promise or threaten to use, any such authority or influence, directly or indirectly, to coerce or persuade the vote or political action of any person, or the removal, discharge or promotion of any employe of the city.

Sec. 19. *Political activity of classified employes.*—No person holding a position in the classified service shall use his official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take an active part in a political campaign, or shall seek or accept nomination, election or appointment as an officer of a political club or organization, or serve as a member of a committee of any such club or organization, or circulate or seek signatures to any petition provided for by any primary or election law, or act as a worker at the polls, or distribute badges, color or indicia favoring or opposing a candidate for election or nomination to a public office, whether federal, state, county or municipal. But nothing in this section shall be construed to prohibit or prevent any such person from becoming or continuing to be a member of a political club or organization or from attendance upon political meetings, from enjoying entire freedom from all interference in casting his vote, from expressing privately his opinions on all political questions, or from seeking or accepting election or appointment to public office, provided, however, that no active campaign for election shall be conducted by any employe unless he shall first resign from his position.

Sec. 20. *Leave to be granted for purpose of voting.*—On any election day which is not a state or national holiday, the offices of the city shall remain open for business. All employes shall be entitled to vote and whenever necessary may be granted not more than four hours' leave with pay for the purpose of voting.

Sec. 21. *False statements under oath.*—No person knowingly and willfully shall make under oath any false statement in any application or other statement filed with, or in any proceeding before, the director of personnel, or the civil service commission, or in any investigation conducted by the director or the commission.

Sec. 22. *Violations of civil service provisions.*—Any person who shall willfully or through culpable negligence violate or conspire to violate any provision of this article or of any ordinance made pursuant theretofore which no other punishment is provided herein, shall be guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars or by imprisonment for not to exceed six months, or both, in the discretion of the court. The conviction of any employe of any such offense shall operate automatically to terminate his service and to vacate his position. Any employe so removed from the service shall not be reinstated, reemployed or reappointed, or in any other manner re-enter the service of the City of St. Louis for a period of five years from the date of such conviction, and the comptroller and any other fiscal officers responsible for payment of any compensation to such person are hereby charged with notice thereof. Nothing in this section shall be construed to supplant or in any way

affect any prosecution that may be elected to be initiated under any other provision of law relating to the nonfeasance, malfeasance of public officers.

Sec. 23. *Compliance with article and civil service rules.*—It shall be the duty of all employes to conform to and comply with, and to aid in all proper ways in carrying into effect, the provisions of this article, and the rules and ordinances prescribed thereunder. Whenever the director of personnel shall make any order under the provisions of this article or in accordance with any rules or ordinance thereunder, the employe to whom such order is directed shall forthwith comply with the terms and provisions thereof, and any failure or neglect on the part of such employe properly to satisfy or meet the requirements of such order without sufficient justification therefor, shall be construed as grounds for his removal, subject to all rights of appeal and review provided by this article or by ordinance or law.

Sec. 24. *Legal remedies for payment of unauthorized compensation.*—The city counselor, or special counsel designated therefor by the board of aldermen, on complaint of any officer or employe of the city or of any taxpayer, shall prosecute, and of his own motion may prosecute, such action as may be appropriate to restrain the payment of salary or other compensation to any persons appointed to or holding any position in violation of any of the provisions of this article or the rules and ordinances thereunder, or to recover any payment so made, and such right shall not be limited or denied by reason of the fact that such position shall have been classified as, or determined to be, not subject to competitive tests. All money recovered in any action brought under the provisions of this section shall, when collected, be paid into the treasury of the city.

Sec. 25 *Investigatory powers of director; payment of witnesses.*—In the course of any hearing, investigation or tests of fitness conducted under the provisions of this article, the director

of personnel and any other person authorized by him as his representative for such purposes, shall have power to administer oaths, to subpoena and require the attendance of witnesses within the city and the production by them of books and papers pertinent to any matter of inquiry and to examine such witnesses under oath, in relation to any matter properly involved in such proceeding. For such purposes, the director or his authorized representative may invoke the power of any court of record in the city, or judge thereof, in term time or vacation, to compel the attendance and testifying of witnesses and the production of books and papers in compliance with such subpoenas. All witnesses so subpoenaed, who are not employes of the city, shall be entitled to the same fees as are allowed in civil cases in courts of record, which shall be paid upon vouchers approved by the director of personnel from the appropriations of the department of personnel on the audit and warrant of the comptroller.

Sec. 26. *Effect of established title and rates of pay.*—The titles and rates of pay of any positions in the classified service, as set forth in any ordinance or appropriation now or hereafter in effect, shall be deemed to be permissive only, authorizing positions that might properly be designated by such titles and compensated at such rates if so constituted that such titles and rates would apply under the provisions of this article, but not as mandatory in requiring that such titles shall be used to designate such positions to the execution of all others or that payments shall be made at such rates, irrespective of the true nature of the positions existing by virtue of such authority and of whether such titles and rates are appropriate to the positions as actually constituted.

Sec. 27. *Partial invalidity of provisions.*—If any part of this amendment is held by competent authority to be invalid, every other part thereof not so held, shall continue in full force and effect as though such invalid part had not been included therein.

Sec. 28. *Repeal of inconsistent provisions.*—All provisions of the city charter and ordinances and rules thereunder, or parts thereof, inconsistent with this amendment, are hereby repealed.

Sec. 29. *Powers and duties of efficiency board vested in personnel board.*—All powers and duties delegated to the efficiency board by this charter which are not specifically repealed by this amendment are preserved in full force and effect to the personnel department.

Sec. 30. *Effective date.*—This amendment shall take effect immediately, except that pay rolls may be certified and payments be made thereon, under the provisions of previously existing charter provisions, and ordinances and rules applicable thereto, during such temporary period not to exceed one year as is necessary in the opinion of the civil service commission, to provide for the director of personnel, the rules, the classification and compensation plans, the ordinances, the allocation of the existing positions to their appropriate classes and the fixing of the rates of compensation thereunder, and the forms and procedures, necessary for full compliance with the provisions of this article.

(Art. XVIII amended to present form, pursuant to Ord. 42021.)